91-98

No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WHITE BUDD VAN NESS PARTNERSHIP,
Petitioner,

v.

MAJOR-GLADYS DRIVE JOINT VENTURE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Texas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Texas Supreme Court's dismissal of an application for a writ of error, purportedly because of failure to conform to the "spirit" of a rule regarding page limitations, violates the Fourteenth Amendment's guarantee of procedural due process when the application in fact did not exceed the stated page limitation and the court never gave notice of its apparent requirements regarding typeface and margins.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petition for a Writ of Certiorari to the Supreme Court of Texas

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The White Budd Van Ness Partnership petitions for a writ of certiorari to review the final order of the Supreme Court of Texas entered in this proceeding on March 20, 1991.

OPINIONS BELOW

The Supreme Court of Texas's order striking and dismissing petitioner's application for a writ of error is unreported and is reprinted in the Appendix hereto at 1a. The decision of the Court of Appeals of Texas, Beaumont, is reported at 798 S.W.2d 805 and is included in the Appendix hereto at 2a-34a. The judgment entered upon a jury verdict by the 58th District Court of Texas, Jefferson County (Walker, J.), is unreported and is included in the Appendix hereto at 35a-46a.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1990. The application for a writ of error was denied by the Supreme Court of Texas on March 20, 1991, and petitioner's motion for rehearing was overruled on April 17, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Fourteenth Amendment, Section 1, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 131(i), Texas Rules of Appellate Procedure:

> Length of Application. An application shall not exceed 50 pages in length, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.

Rule 131(j), Texas Rules of Appellate Procedure:

> Court May Require Application Redrawn. If any brief or application for writ of error is unnecessarily lengthy or not prepared in conformity with these rules, the Supreme Court may require same to be withdrawn.

Rule 185, Texas Rules of Appellate Procedure:

> **No Affirmance, Reversal Or Dismissal For Want Of Form Or Substance**
>
> The Supreme Court will not affirm or reverse a judgment or dismiss a writ of error for defects or

irregularities in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities.

STATEMENT OF THE CASE

A. Preliminary Statement

This petition raises the issue whether the Supreme Court of Texas violated petitioner's right to due process by denying its application for a writ of error because of the typeface and margin size used in the application. The Supreme Court of Texas has no published rule regarding typeface and margin size and has never announced such a rule in any of its decisions. Briefs using identical typeface and only slightly different margins were accepted by the Supreme Court of Texas and the Texas Court of Appeals in this same case, when submitted by the respondent.

Until the court dismissed petitioner's application for a writ of error in the Order dated March 20, 1991, based on a violation of the "spirit" of the page limitation rule, *see* App. 1a, petitioner had no notice or knowledge of the court's objection to the typeface and margin size it used. Counsel acted in good faith at all times in attempting to conform to the court's requirements and would have filed the petition with a different typeface and margin size if the court had made its requirements known. *See* App. 53a-59a, 65a. Under these circumstances, the court's dismissal of the petitioner's application for a writ of error was arbitrary, capricious, and a flagrant violation of the most basic principles of due process.

B. Statement Of Facts

1. *Proceedings in the Lower Courts*

This petition arises from a suit against petitioner, The White Budd Van Ness Partnership ("WBVN"), by the developers of a shopping mall project for which WBVN provided architectural services. The developer sought, on various legal theories, to hold WBVN liable in connection

with problems relating to the tile used in certain portions of the mall. After a trial on the merits, the jury determined that WBVN had violated the Texas Deceptive Trade Practices and Consumer Protection Act (the "DTPA"), Tex. Bus. & Com. Code Ann. § 17.41 *et seq.* (Vernon 1987) breached its contract, and failed to perform architectural services in a good and workmanlike manner. Judgment was entered on December 16, 1988, in the sum of $498,157.40, plus appellate attorneys' fees. App. 2a-7a.

WBVN appealed to the Texas Court of Appeals, Beaumont, which affirmed. Among other rulings, the court of appeals held that the strict liability provisions of the DTPA, Tex. Bus. & Com. Code Ann. § 17.46(a) (Vernon 1987), apply to services involving the exercise of professional judgment, and that the implied warranty of good and workmanlike performance applies to professional architectural services. App. 8a-11a, 14a-18a. The court's decision also resolved questions concerning the admissibility of so-called "Mary Carter" agreements [1] and the recoverability of pre-judgment interest. *Id.* at 18a-21a, 24a-25a. These and other issues resolved by the court are of paramount importance to the liability of architects and other professionals under Texas law, as evidenced by the amicus briefs filed in support of WBVN's application for a writ of error to the Texas Supreme Court.[2]

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[1] A "Mary Carter" agreement occurs when a plaintiff agrees to settle its claims against one defendant in return for that defendant's cooperation in prosecuting claims against the other defendants, with the settling defendant generally having a financial interest in the plaintiff's recovery from the remaining defendants. The jury in this case was not told that a contractor who had originally been a co-defendant of WBVN had entered into such a "Mary Carter" agreement. The trial court's exclusion of this evidence was upheld on appeal. App. 18a-21a.

[2] The following groups joined in amicus briefs: (1) Texas Society of Architects; (2) Texas Association of Realtors; (3) Consulting Engineers Council of Texas, Inc.; (4) Texas Medical Association; (5) Texas Pharmaceutical Association and (6) Texas Civil Justice League.

2. *Proceedings in the Supreme Court of Texas*

On or about November 2, 1990, Guy S. Lipe, Esquire, of Vinson & Elkins, submitted an application on behalf of WBVN to the Texas Supreme Court for a writ of error to review the decision of the court of appeals. The application consisted of 103 pages and was submitted with a motion for leave to file an application in excess of 50 pages. *See* Rule 131(i), Tex. R. App. P. The Supreme Court of Texas denied the motion and ordered the petition to be redrawn. App. 68a.

Lipe then shortened the original application by deleting approximately one-third of the text and using smaller type size and margins. App. 55a. The Redrawn Application For Writ Of Error (the "First Redrawn Application"), filed on or about February 4, 1991, consisted of 52 pages, including approximately three pages containing points of error, which are not counted against the page limitation. *See* Rule 131(i), Tex. R. App. P.[3]

On February 12, 1991, Lipe received a telephone call from Peggy Littlefield, Chief Deputy Clerk of the Supreme Court of Texas, who informed him that the court had instructed that the First Redrawn Application be redrawn, pursuant to Rule 131(j). Lipe asked Littlefield for the basis of the court's objection, and she responded that the signature block on the application appeared on page 52. Lipe explained that pages containing points of error do not count toward the page limit, and that the First Redrawn Application contained approximately three pages setting forth points of error. The Chief Deputy Clerk responded that she could only report to Lipe that

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[3] Rule 131(e), Tex. R. App. P., requires "[a] statement of the points upon which the application is predicated . . . in short form without argument and . . . separately numbered." Rule 131(i), quoted in full above, excludes pages containing points of error in computing the length of an application or brief.

the court had determined that the application was overlong and ordered it to be redrawn. App. 56a. By letter dated February 12, 1991, the court confirmed the information communicated in Littlefield's telephone call, instructing that the First Redrawn Application "be redrawn pursuant to Rule 131(j), Texas Rules of Appellate Procedure." *Id.* at 57a-58a, 67a. The court's instruction made no reference to the size of type or margins used in the First Redrawn Application.

In response to these communications, Lipe prepared and filed, on February 18, 1991, petitioner's Second Redrawn Application For Writ Of Error (the "Second Redrawn Application").[4] App. 58a. In this version, Lipe deleted additional text but did not change the typeface and margin size used in the First Redrawn Application. The Second Redrawn Application contained 46 pages, in-

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[4] After the Second Redrawn Application had been served, petitioner received a Motion To Dismiss Appeal in the Supreme Court of Texas. In its motion, respondent stated that the First Redrawn Petition exceeded the fifty-page limit because it allegedly consisted of fifty-two or fifty-three pages. Respondents also alleged that petitioner had attempted to "circumvent" the court's page limitation by reducing the size of the print from that contained in petitioner's original application. Motion To Dismiss Appeal at 2.

Petitioner filed its response to the Motion To Dismiss on February 25, 1991, asserting that it had believed in good faith that its First Redrawn Petition did not exceed the fifty-page requirement and noting that, in any event, petitioner had already submitted a Second Redrawn Application For Writ Of Error consisting of 46 pages, including pages containing points of error. In addition, petitioner stated that the appeal should not be dismissed because of the smaller type used in the First Redrawn Application, noting that, "Petitioner is not aware of any type size restrictions on applications which are contained in the Texas Rules of Appellate Procedure." Petitioner also noted that "the type size utilized in the [First] Redrawn Application appears to be the same type size as that used by Respondent in its original Reply Brief and in the Redrawn Reply Brief filed by Respondent." Petitioner's Response To Respondent's Motion To Dismiss Appeal at 1-2.

cluding points of error. Respondent then filed a second Reply Brief, which used the same typeface as the Second Redrawn Application and only slightly wider margins.[5]

Without any notice or warning, the Supreme Court of Texas on March 20, 1991, issued an order striking the Second Redrawn Application and dismissing petitioner's application. App. 1a. In its Order, the court recognized that the application "technically achieves compliance with the fifty-page limit." Nonetheless, the court dismissed the application because the typeface and margin size violated "the spirit of Rule 131(i), if not the letter of the rule." *Id.*

On or about April 4, 1991, petitioner filed a Motion For Rehearing in the Supreme Court of Texas. App. 49a-61a. In the Motion For Rehearing, petitioner set forth the facts, attached an affidavit from Lipe in which he stated, *inter alia*, that he intended at all times to comply fully with Rule 131(i) and the orders of the Supreme Court of Texas, and included a proposed Third Redrawn Application For Writ Of Error.

C. How Federal Question Raised

The constitutional issue presented here was raised in petitioner's Motion For Rehearing, which was denied on April 17, 1991. App. 53a-59a, 47a-48a (Point No. 3, Statement, Argument and Authorities Under Point Nos. 1-3). This issue could not have been raised at any earlier point

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[5] To assist this Court in its review of this case, petitioner has lodged with the Clerk of this Court copies of the documents discussed in this petition so that this Court may see the typeface and margin size used. The Clerk has one copy of each of the following documents: petitioner's original Application For Writ Of Error; petitioner's Redrawn Application For Writ Of Error; petitioner's Second Redrawn Application For Writ Of Error; respondent's first and second reply briefs, which both used the same type size as petitioner's redrawn applications; and respondent's brief in the court of appeals, which again used the same typeface as petitioner's redrawn applications. *See infra.*

because it did not arise until the Texas Supreme Court dismissed the Application For Writ Of Error.

REASONS FOR GRANTING THE WRIT

The Texas Supreme Court's dismissal of petitioner's Application For Writ Of Error violates the due process requirement of fundamental fairness. Petitioner's case was dismissed without adequate notice of the purported technical defects in its brief. Counsel for petitioner used his best efforts in good faith to comply with the court's rules and to respond to the court's stated objection to the redrawn application. Without being informed of the true reasons for the court's displeasure, however, counsel was powerless to prevent the dismissal. The court's action under these circumstances, especially where it accepted respondent's reply brief using the same typeface size and only slightly wider margins, was by definition arbitrary and capricious and violates the most fundamental requirements of due process.

This Court has recently reaffirmed that "[u]nder our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution'." *Coleman v. Thompson*, 59 U.S.L.W. 4789, 4791 (U.S. 1991) (citations omitted). This Court has repeatedly affirmed its confidence in the ability of state courts to enforce federal constitutional rights. *E.g.*, *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (noting this Court's "emphatic reaffirmation" of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so); *Moore v. Sims*, 442 U.S. 415, 430 (1979) (basing abstention on the competency of state courts). For this confidence to be justified, it is of utmost importance that the state courts provide *all* litigants with the fundamental elements of due process guaranteed by the Constitution. The action taken by the Texas Supreme Court here falls far short of that goal.

A. A State's Appellate Procedures Must Comply With The Due Process Clause

"[T]he procedures used [by a State] in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Even a discretionary appeal is subject to due process scrutiny for fundamental fairness. *See id.* at 401 ("In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."); *cf., e.g., Ross v. Moffitt*, 417 U.S. 600, 611 (1974) (applying due process analysis to State's refusal to provide counsel to indigent defendant seeking discretionary review).

The courts have long recognized, moreover, that sanctions for misconduct in litigation "certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). *See, e.g., Boettcher v. Hartford Ins. Group*, 927 F.2d 23, 26 (1st Cir. 1991) (setting aside sanctions because party did not have fair warning of unwritten rule); *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916-17 (9th Cir. 1987) (in holding there are limits on courts' power to impose sanctions, stating that "[t]he need for the orderly administration of justice does not permit violations of due process."); *Gilbert v. Sowders*, 646 F.2d 1146, 1147 (6th Cir. 1981) (refusal of the Supreme Court of Kentucky to reconsider dismissal of appeal for violation of a "highly technical procedural rule" was arbitrary, capricious, and violated due process). *Cf., Lyons v. Goodson*, 787 F.2d 411, 412 (8th Cir. 1986) ("local rule should not be 'elevate[d] to the status of a jurisdictional requirement' or 'applied in a manner that defeats altogether a litigant's right to

access to the court' "), quoting *Loya v. Desert Sands Unified School Dist.*, 721 F.2d 279, 280 (9th Cir. 1983) (reversing dismissal of complaint filed on legal rather than letter-sized paper in violation of local rule). The sanction of outright dismissal by its nature raises even greater due process concerns than those presented by lesser sanctions for litigation misconduct, such as penalties against lawyers or the awarding of costs. *See Roadway Express, Inc. v. Piper*, 447 U.S. at 767 n.14.

B. Due Process Requires That An Appellate Court Provide Notice And A Meaningful Opportunity To Comply With The Court's Rules

In dealing with the issue of overlong briefs, most courts have at least tacitly recognized the requirements of due process in this area by invoking sanctions only after notice has been given of the infraction, either in the form of a local court rule or a warning delivered in a published opinion. *See, e.g., Neeley v. Bankers Trust Co.*, 757 F.2d 621, 634 n.18 (5th Cir. 1985) ("Although we go no further in this case than to note the infraction, we warn counsel that violations may result in the Court's striking of their briefs *sua sponte*"); *Prudential Ins. Co. v. Sipula*, 776 F.2d 157, 161 n.1 (7th Cir.1985) (because appellant filed brief before court published warning regarding overlength, "we will not impose sanctions. However, we will not hesitate to do so in the future"); *City of Tenakee Springs v. Clough*, 750 F. Supp. 1406, 1409 n.2 (D. Alaska), *rev'd and remanded on other grounds*, 915 F.2d 1300 (9th Cir. 1990) ("Plaintiff's counsel are notified that the court in the future will not in this or in other litigation consider counsel's moving papers unless they are printed at 10 characters per inch and otherwise conform with the requirements under the local rules").

Courts imposing sanctions for the use of reduced type size have relied on specific rules prohibiting such use. *See, e.g., Westinghouse Elec. Corp. v. NLRB*, 809 F.2d 419, 425 (7th Cir. 1987) (when appellant disregarded

rules regarding form of briefs, *see* Rule 32(a), Fed. R. App. P., court imposed a penalty on counsel of $1,000); *EDC, Inc. v. Navistar Int'l Transp. Corp.*, 915 F.2d 1082, 1083 (7th Cir. 1990) (counsel "played typographical tricks to squeeze into the brief more words than . . . allowed" with the result that the Seventh Circuit, after allowing the appellant three attempts to file a brief conforming to published rules and in reliance on the warning it had issued in *Westinghouse*, ordered that the appellant show cause why its appeal should not be dismissed; brief accepted when counsel showed reliance on erroneous advice of Clerk's Office). These courts complied with the due process requirement of fundamental fairness by giving clear notice of the conduct proscribed before punishing a party for engaging in it. *See also Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 571 (3d Cir. 1985) ("fundamental fairness may require some measure of prior notice to an attorney that the conduct that he or she contemplates undertaking is subject to discipline or sanction by a court").

In this case, by contrast, the Supreme Court of Texas dismissed petitioner's Application For Writ of Error without giving the petitioner notice of the rules purportedly violated. Moreover, the Clerk's advice that the Court's objection was that the brief had too many pages deflected petitioner from the true reason for its displeasure. Only in hindsight, with the benefit of the court's March 20, 1991 Order of dismissal, did it appear that the Supreme Court of Texas objected to the re-drawn applications' smaller typeface and margins.[6] The Court's undisclosed change of

[6] Actually, the Court's Order dismissing WBVN's application seems to confirm that the First Redrawn Application was rejected because the Court erroneously believed that it exceeded the fifty-page limit, as the Chief Deputy Clerk advised Lipe when he inquired, and not because of its typeface or margins. Specifically, the order states that the First Redrawn Application "still did not comply with the Rules of Appellate Procedure," but that the Second Redrawn Application (with identical typeface and margins) "technically achieves compliance with the fifty page rule." In fact, the fifty-two

course, rather than providing petitioner with the notice due process requires, only obscured the view of what was to be deemed acceptable.

Even now, it remains unclear under what circumstances the typeface size used in petitioner's redrawn applications is unacceptable in Texas appellate courts, since the identical typeface size, 12 point elite, was used by the respondents in their reply briefs in the Texas Supreme Court and in their brief in the Texas Court of Appeals.[7] Further, although it is now evident that the size of the margins used in petitioner's redrawn applications is unacceptable, the Supreme Court of Texas has provided no guidance as to the acceptable margin size. Thus, litigants in the future will have to guess whether the documents they seek to file will be acceptable. When the penalty for guessing wrong is, as in this case, dismissal, the court's procedures are inherently unfair and, as we discuss further below, raise the potential for inconsistent adjudications that violate the Equal Protection Clause.[8]

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page First Redrawn Application achieved compliance with the rules because it included three pages of points of error, which under Rule 131(i) do not count against the fifty-page limit.

[7] The acceptance of respondent's brief in the Court of Appeals is significant because that court operates under a page limitation rule that is substantively equivalent to that of the Texas Supreme Court. *See* Rule 74(h), Tex. R. App. P. The fact that briefs using the same typeface employed by petitioner's counsel here are routinely accepted in Texas appellate courts, and actually were accepted even in this case, further demonstrates the reasonableness of counsel's belief that the redrawn application complied with the rules.

[8] The Texas Supreme Court's action here also violates its own rules. Significantly, Rule 185, Tex. R. App. P., provides that "the Supreme Court will not affirm or reverse a judgment or dismiss a writ of error for defects or irregularities in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities." As a practical matter, defects and irregularities cannot be corrected, no matter how much time is provided, unless the party is informed of the nature of the wrongs committed. The actions of the Texas Supreme Court in this case must therefore be reversed if the court is to follow its own rules. *Cf. United States v. Ferretti*, 635 F.2d 1089,

C. Due Process Requires Even-Handed Application Of Appellate Court Rules

It is well established that "when an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). This Court has required "that the state appellate system be free of unreasoned distinctions." *Ross v. Moffitt*, 417 U.S. at 612 (citing *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)). In *Rinaldi*, the Court explicitly stated that

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

384 U.S. at 310.

The actions of the Supreme Court of Texas arbitrarily deprived petitioner of the right to review in that court. It remains a mystery why the slight difference in the margins employed by the petitioner and the respondent made petitioner's document "difficult to read," App. 1a, but not respondent's.

Equal access to the courts is guaranteed to all litigants by the Fourteenth Amendment. *E.g., Ross v. Moffitt*, 417 U.S. at 612; *Rinaldi v. Yaeger*, 384 U.S. at 310. *See In Re Citizens Mortgage Inv. Trust*, 25 Bankr. 1005, 1008 (Bankr. D. Mass. 1982) ("Due process does not require in a civil case that access to appellate review, once granted, be subject to no conditions but rather that any restrictions imposed be related in a rational way to a legitimate government objective and be applied in a manner which does not discriminate arbitrarily or capri-

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1093 (3d Cir. 1980) ("[O]nce a court announces a policy or rule of procedure, until such rule is effectively repealed, the court cannot ignore its own rule or procedure. . . ."); *Woods Constr. v. Atlas Chem. Industr., Inc.*, 337 F.2d 888, 890 (10th Cir. 1964) (rules of practice have the force and effect of law, and are binding upon the parties and the court which promulgated them).

ciously"). *See also Evitts v. Lucey*, 469 U.S. 405; *Ross v. Moffitt*, 417 U.S. at 608-09; *Bearden v. Georgia*, 461 U.S. 660, 665 (1983) ("Due Process and equal protection principles converge in the Court's analysis in these cases"). The action of the Texas Supreme Court in this case violated that precept.

D. Petitioner's Good Faith Attempts To Comply With The Order Of The Supreme Court Of Texas Preclude Dismissal Of Its Application For Writ Of Error.

Ultimately, whether due process was violated must depend on the particular facts and circumstances in the case at hand. *See, e.g., Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962) ("The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct"). Moreover, in assessing the validity of a sanction, the good faith of the offending party must be considered. *Roadway Express, Inc. v. Piper*, 447 U.S. at 767 n.14.

In this case, every objective indicator demonstrates that counsel for petitioner acted in the utmost good faith throughout the proceedings in the Supreme Court of Texas. Counsel timely redrew petitioner's application on both occasions that it was rejected by the court, deleting significant portions of the text. Examination of the text and consideration of the importance of the issues presented, moreover, demonstrates that petitioner's application was not "padded," but attempted to develop the issues with reasonable thoroughness, clarity and conciseness. Although counsel used smaller typeface size in the First and Second Redrawn Applications, the typeface size used was identical to that used by the respondent in its reply brief in the Texas Supreme Court and in its brief in the Texas Court of Appeals. The smaller margins used in the redrawn applications were reasonable and not materially different than those used by the respondent.

Most importantly, counsel had no reason to know that the typeface size or margins offended any rule or policy of the Supreme Court of Texas. Briefs with the same typeface and margins are routinely accepted in courts in Texas and elsewhere. It defies good sense as well as due process to impose the draconian penalty of dismissal on a party that was attempting in good faith to satisfy the court's requirements.

The course of these proceedings reveals that counsel for petitioner was willing to make any revision required by the court to effectuate filing. Counsel's inability to do so can be attributed only to the court's failure to inform litigants of its requirements. At no time did counsel demonstrate any contumacious conduct that might justify the imposition of the sanction of dismissal.[9] *See In re Estate of Ray*, 804 P.2d 458, 459 (Okla. App. 1990) (brief stricken and appeal dismissed for willful noncompliance with page limitation, where party submitted identical, overlong brief with renumbered pages, purporting to satisfy the page limitation by numbering excess pages with roman, rather than arabic, numerals). Counsel here simply failed to divine the court's wishes.

E. Summary

Although this case deals with the usually mundane subject of type size and margins, it raises fundamental questions about the operation of a state court system. Due

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[9] To the contrary, counsel's inquiry to the Chief Deputy Clerk shows that he was seeking in good faith to comply with the Court's wishes, but could not ascertain the basis for the Court's rejection of his redrawn application. Judge Easterbrook, who has been particularly rigorous in enforcing page limitations, recently concluded that sanctions should not be applied where the typeface in a brief violated a local rule because counsel relied on advice from the Clerk's office. *EDC, Inc. Navistar Int'l Transp. Corp.*, 915 F.2d at 1085 ("An error after prudent inquiry with the clerk's office is not one for which any sanction is appropriate"). A fortiori, no sanction is appropriate where, as here, the form of a brief does not violate any rule, but rather only an unarticulated preference that counsel failed to divine.

process requires both fairness and the appearance of fairness. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). The action of the Texas Supreme Court here satisfies neither requirement, and was in fact outrageously arbitrary and capricious.

There is no question that the Texas Supreme Court can establish detailed form requirements for applications filed there. But it cannot, consistent with due process, expect parties and counsel to read its mind as to when on any particular day it will determine that previously acceptable typeface or margins are too small. Neither can it apply one unwritten rule for some parties and a different unwritten rule for other parties. Rather, uniform rules, announced with fair notice and applied equally to all parties, are minimum requisites of due process.

Thus, the principles at stake here go far beyond rules about typeface and margins. The question is whether the state courts must afford litigants the most basic attributes of due process. The Texas Supreme Court did not do that here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. D-0502

WHITE BUDD VAN NESS PARTNERSHIP,
Petitioner

v.

MAJOR-GLADYS DRIVE JOINT VENTURE,
Respondent

From Harris County
Fourteenth District

ORDER

On January 24, 1991, this Court overruled Petitioner's motion to permit a brief in excess of the page limit fixed by Rule 131(i) of the Texas Rules of Appellate Procedure. Petitioner then submitted a revised application; but because the application still did not comply with the Rules of Appellate Procedure, the Court ordered the application redrawn. Tex. R. App. P. 131(j). Petitioner has since submitted another redrawn application. Although the redrawn application technically achieves compliance with the fifty-page limit, it does so only through reduction of print size and diminution of margins, rendering the application difficult to read. This violates the spirit of Rule 131(i), if not the letter of the rule. Because Petitioners' redrawn application fails to conform to the requirements of Rule 131(i), Tex. R. App. P., we strike Petitioners' Application for Writ of Error and the same is dismissed.

ORDER DELIVERED: March 20, 1991

APPENDIX B

COURT OF APPEALS
NINTH DISTRICT
BEAUMONT, TEXAS

No. 09-89-074 CV

THE WHITE BUDD VAN NESS PARTNERSHIP,
Appellant

VS.

MAJOR-GLADYS DRIVE JOINT VENTURE,
Appellee

Appeal from the 58th Judicial District Court
of Jefferson County, Texas

OPINION

[Filed Sept. 6, 1990]

This is a suit to recover damages from an architectural firm, Defendant/Appellant, for its alleged failure to properly investigate and advise Plaintiff/Appellee concerning the use of a specific type of tile in the construction of a shopping center. Plaintiff/Appellee joined the contractor as a defendant for improper installation of the tile. Prior to trial, Plaintiff/Appellee settled with the contractor, entered into a so-called "Mary Carter" agreement with the contractor, and obtained a dismissal of the contractor from the suit. Based on jury findings, the court entered judgment for Plaintiff/Appellee against Defendant/

Appellant in the sum of $498,157.40, plus appellate attorneys' fees.

Plaintiff/Appellee, a small group of persons, formed the Major-Gladys Drive Joint Venture to develop certain properties into a shopping center. Plaintiff/Appellee was not knowledgeable in the field of architecture and entered into a contract with Defendant/Appellant to serve as architects.

After hiring Defendant/Appellant and receiving cost estimates, it became apparent to Plaintiff/Appellee that it needed to cut costs in the building of the shopping center. "C-Tile" was less costly than the proposed material but the parties were not familiar with its usage, characteristics or costs. The use of "C-Tile" was suggested as a possible alternative. Defendant/Appellant was not familiar with "C-Tile" but looked into the product. As a result of its inquiries, Defendant/Appellant advised the Plaintiff/Appellee that the "C-Tile" could be used on the project and would be less costly. Relying on Defendant's/Appellant's advice, Plaintiff/Appellee approved the use of "C-Tile" on the project. The end result was that the "C-Tile" started coming loose and eventually had to be replaced.

Problems arose with the "C-Tiles". The "C-Tiles" were not sticking down. There were other problems with the "C-Tile". The tile had problems with weight bearing. The lack of weight-bearing quality resulted in the "C-Tile" becoming damaged. This "C-Tile" had not been used on other projects; it was a new product.

A witness who had been formerly associated with White Budd Van Ness testified that there were a number of problems with the "C-Tile". This witness said that he would not have put any tile in the weight-bearing areas had it been quarry tile or "C-Tile". He suggested, instead, the use of concrete or Bomanite. This witness repeated that he would not have put any kind of tile in the weight-

bearing areas, including, of course, "C-Tile". He agreed the "C-Tile" was a fairly new product. The "C-Tile" was a substitute for Bomanite. The contractor said he could not install Bomanite. A non-architect, with White Budd Van Ness, at one point, advised the Joint Venturers that the Bomanite could not be installed. The Plaintiff's/Appellee's contentions were that the architect did not adequately investigate the "C-Tile" and its characteristics. This witness and the licensed architect in charge of the shopping center reviewed the tile situation. The witness stated that it was agreed between him and the architect that tile of any type should not be used in the trucking area and that a concrete strip was installed at about the same time that the "C-Tile" change order was approved. This witness testified that the members of the Joint Venture did not have knowledge of an architectural nature. The problem with the "C-Tile" triggered the litigation. Plaintiff/Appellee filed the present lawsuit against all parties involved but, as noted above, the only defendant left in the lawsuit by time of trial was the Defendant/Appellant.

The jury, in response to certain special issues or questions, found that the architects' partnership represented that the "C-Tile" and/or architectural services had sponsorship, approval, characteristics, ingredients, uses, benefits or qualities which the tile, or the architectural services, did not have; that the architects represented that the "C-Tile" and other architectural services were of a particular standard, quality or grade, of which they were not; represented that the architectural agreement (contract) conferred or involved certain rights and remedies, which the agreement did not have; the architects failed to disclose to the Venture information concerning the "C-Tile", and/or architectural services which were known at the time of the execution of a certain, crucial change order; and, that such failure to disclose and to inform the Joint Venture of such information was intended to

induce the Plaintiff/Appellee into a transaction which the Plaintiff/Appellee would not have entered into if such correct information had been disclosed. The jury found Defendant/Appellant Partnership engaged in unconscionable action or a course of action. The jurors found the Partnership committed the acts and failures immediately listed above and each was a producing cause of damages to the Plaintiff's/Appellee's venture.

In addition, the jury found that the architectural firm approved tile that was not suitable for the purpose for which the tile was to be used, while having reason to know of such purpose and of the Plaintiff's/Appellee's reliance upon the Defendant's/Appellant's skill or judgment to approve suitable tile. In answer to a separate question, the jury found that the Partnership breached in several respects its contract with the Plaintiff/Appellee and that the several breaches were each a proximate cause of damages. The special verdict determined that, in breaching the contract, the architects were negligent in performing certain services; and, specifically, that the partnership was negligent in the investigation of the tile, in advising the Plaintiff/Appellee as to the tile's proper use, in the proper preparation of plans and specifications, and in inspections of the installation of the tile. Also, a finding was returned that the Partnership failed to perform architectural services pertaining to the "C-Tile" in a good and workmanlike manner.

Gary Clark Contractors, Inc., was a Defendant. The jury found that Contractors, Inc., failed to comply with its agreement with the Plaintiff/Appellee and that the failure was a proximate cause of the damages and that Contractors, Inc., caused 20% of the damages and that The White Budd Van Ness Partnership caused 80%.

Significantly, in Special Issue No. 16, the jury found that the Van Ness Partnership knowingly made some of the representations or knowingly engaged in the conduct

inquired about in Special Issue No. 1 set out below, in summary:

"SPECIAL ISSUE NO. 1

"Do you find from a preponderance of the evidence that the Defendant, WHITE BUDD VAN NESS PARTNERSHIP committed any of the following acts which were a producing cause of damages, if any, to Plaintiff?

"A. Represented that the 'C-Tile' and/or the architectural services had sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities, which it did not have.

"ANSWER 'WE DO' or 'WE DO NOT':

"ANSWER: *We do*

"B. Represented that the 'C-Tile' and/or the architectural services were of a particular standard, quality, or grade which it was not.

"ANSWER 'WE DO' or 'WE DO NOT'.

"ANSWER: *We do*

"C. Represented that the architectural agreement confered [sic] or involved rights, or remedies which it did not have.

"ANSWER 'WE DO' or 'WE DO NOT':

"ANSWER: *We do*

"D. Failed to disclose to Plaintiff information concerning the 'C-Tile' and/or architectural services which was known at the time of the execution of Change Order No. 3, when such failure to inform Plaintiff of such information was intended to induce the Plaintiff into such transac-

tion which the Plaintiff would not have entered into if such information had been disclosed.

"ANSWER 'WE DO' or 'WE DO NOT':

"ANSWER: *We do*

"E. Engaged in any unconscionable action or course of action.

"ANSWER 'WE DO' or 'WE DO NOT':

"ANSWER: *We do*

"F. Furnished or selected tiles that was [sic] not fit for the ordinary purposes for which tile is used.

"ANSWER 'WE DO' or 'WE DO NOT':

"ANSWER: *We do not*

"G. Approved tile that was not suitable for the purpose for which the tile was to be used, while having reason to know of such purpose and of Plaintiff's reliance on the Defendants' skill or judgment to approve suitable tile.

"ANSWER 'WE DO' or 'WE DO NOT':

"ANSWER: *We do*

"An 'unconscionable action or course of action' is an act or practice that, to a person's detriment, either: (a) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or (b) results in a gross disparity between value received and consideration paid, in a transaction involving transfer of consideration.

Basically, then, this cause of action can be described as an architect malpractice suit.

One of Appellant's Basic Positions

The Appellant argues that the liability provisions of TEX. BUS. & COM. CODE ANN. Sec. 17.46 (b) (Vernon 1987) have no application to professional architects' services; hence, the trial court erred in overruling the Appellant's Motion for Directed Verdict and for a Judgment Notwithstanding the Verdict.

As to Special Issues No. "1 A", "1 B", and "1 C", Appellant tacitly concedes, we think, that the trial court submitted these three issues to the jury as alleged violations of three of the so-called "laundry-list" provisions of TEX. BUS. & COM. CODE ANN. Sec. 17.46 (b) (Vernon 1987), of the Texas Deceptive Trade Practices Act, and, especially, Sec. 17.46 (b), (5), (7), and (12). TEX. BUS. & COM. CODE Sec. 17.46 (Vernon 1987) declares certain acts and practices unlawful.

Asserting that these specific provisions of the DTPA are strict liability provisions, requiring only proof of innocent misrepresentations and requiring no proof of intent to deceive; Appellant vigorously contends that these special questions were improperly submitted to the jury. Hence, they cannot form a basis of a judgment against the architectural partnership *because these provisions have no, and can have no, applicability to a cause of action grounded on alleged professional malpractice.* Simply put, the DTPA can have no application to professional architectural services.

Of significance and interest is TEX. BUS. & COM. CODE ANN. Sec. 17.44 (Vernon 1987) which mandates that this Act shall be liberally construed and applied in order to promote its underlying purposes. The purposes are declared to be those which protect the consumers against false, misleading and deceptive business practices, unconscionable actions and breaches of warranty and the purposes are *to provide efficient and economical procedures to secure such protection.* We conclude that Sec. 17.44 clearly declares the Legislature's intention.

In *Heath v. Herron*, 732 S.W.2d 748 (Tex. App.—Houston [14th Dist.] 1987, writ den.), the Court wrote, at page 754:

> "We are aware that legal services are actionable under the DTPA. *See, e.g., DeBakey v. Staggs*, 612 S.W.2d 924 (Tex. 1981)...."

Professional Services and Unconscionable Action

The Supreme Court, in *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988), wrote, at page 647:

> "Accordingly, it becomes unnecessary to address Maverick's contention that the DTPA is not applicable to this cause of action. In concluding thus, we recognize that we have previously held a lawyer's unconscionable conduct to be actionable under the DTPA. *DeBakey v. Staggs*, 612 S.W.2d 924 (Tex. 1981)...."

It is a truism to state that, in the United States, legal and architectural services are professional. Because the jury found, specifically, that the partnership engaged in unconscionable action, or an unconscionable course of action, we hold that the DTPA is applicable to the professional services or, as characterized by one brief, to architectural malpractice. TEX BUS. & COM. CODE ANN. Sec. 17.45 (5) (Vernon 1987) reads:

> "(5) 'Unconscionable action or course of action' means an act or practice which, to a person's detriment:
>
> "(A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or
>
> "(B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration."

Under this definition and the jury's special answers, we conclude that the DTPA is applicable and forms a valid basis for the judgment. We overrule this contention of the Appellant.

The Eastland Court of Appeals, in 1981, held that a widow's claim for worker's compensation benefits, for the death of her husband, was barred since the claim was not filed within six months after the husband's death; but the widow had the right to proceed against her first attorney for the benefits to which she would have been entitled. The court held that the widow could seek damages under the Deceptive Trade Practice-Consumers Protection Act, TEX. BUS. & COM. CODE ANN. Sec. 17.41 et seq. (Vernon 1987). *Texas Emp. Ins. Ass'n v. Tobias*, 614 S.W.2d 901 (Tex. Civ. App.—Eastland 1981, writ dism'd). It seems clear to us that the *Tobias, supra*, case is a decisional precedent allowing a recovery under the DTPA for professional malpractice.

In *Barnard v. Mecom*, 650 S.W.2d 123 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.), the unanimous court affirmed a judgment against an attorney-at-law. The Appeals Court reasoned that the trial court found that the attorney had committed an unconscionable action because the attorney took advantage of the client's lack of knowledge, abilty, experience and capacity to a grossly unfair degree and because there was a gross disparity between the amount paid by the client and the value the client received from the attorney. The Corpus Christi Court based its affirmance on TEX. BUS. & COM. CODE ANN. Secs. 17.45 (5) and 17.50 (a) (3) (Vernon Supp. 1982), further finding that the actions of the attorney were a producing cause of actual damages. The trial court also applied Sec. 17.50 (b) (1) to increase the award to a total of $11,000.00 in damages; this $11,000.00 award was affirmed. We conclude that the well-reasoned case of *Barnard, supra*, undergirds our resolution and rejection of Appellants's contention.

Special Issue No. 16 and Its Instruction

Furthermore, it must be stressed that the jury found that the partnership knowingly made representations in Special Issue No. 1, or knowingly engaged in conduct inquired about in Special Issue No. 1. These matters are inquired about in Special Issue No. 16. Issue No. 16 with predicate reads:

> "If you have answered Special Issue No. *1* or any subpart thereof 'We do', then answer Special Issue No. *16*; otherwise do not answer Special Issue No. *16*.
>
> "SPECIAL ISSUE NO. 16
>
> "You are instructed that 'knowingly' means actual awareness by Defendant WHITE BUDD VAN NESS PARTNERSHIP of the falsity or deception, if any, of the representations made by Defendant, if any, but actual awareness may be infered [sic] where objective manifestations indicate that a person acted with actual awareness.
>
> "Do you find from a preponderance of the evidence that the Defendant WHITE BUDD VAN NESS PARTNERSHIP either (1) knowingly made any of the representations or (2) knowingly engaged in the conduct inquired about in Special Issues [sic] No. 1?
>
> "ANSWER 'WE DO' or 'WE DO NOT':
>
> "ANSWER: *We do*"

We construe the jury's answer to Special Issue No. 16, finding "knowingly made" and "knowingly engaged", in the matters inquired about in Special Issue No. 1, to be equivalent to and tantamount to a finding that the Appellant violated the standard of professional care which an architect, under the substantive law, is under a duty to render to clients.

The Negligence Issues and Their Instruction

But, in a separate series of issues, the jury found that the Van Ness Partnership was negligent in their investigation of the tile (the "C-Tile"); that the Partnership was negligent in advising the Plaintiff/Appellee as to the tile's proper use; further, negligence was committed in the preparation of the plans and specifications and negligence was committed in the inspections of the installation of the tile. These several negligences were found by the jury to be a proximate cause of the damages to the Venture.

Furthermore, a careful reading of the instructions and definitions, especially concerning negligence, ordinary care and proximate cause, as those definitions relate to the conduct of the Van Ness Partnership, clearly form a basis for the judgment entered below when the entirety of the verdict and the entirety of the record is considered and analyzed. Again, it must be remembered that the jury found unconscionable actions which were committed by the partnership. Hence, the Appellant's reliance upon *DeBakey v. Staggs*, 612 S.W.2d 924 (Tex. 1981) is not sound. We simply cannot agree with the Appellant's thrusting argument that liability has been imposed on professionals merely by virtue of innocent representations. We respectfully make rejoinder and say that their contention is disproved by the record before us.

Next, the Appellant ably argues two points of error, stating that the evidence is legally insufficient to sustain the jury's answers to Special Issues No. 1 (A), 1 (B), and 1 (C) and also that the evidence is factually insufficient to sustain the jury's answers to the same special issues. We have endeavored to apply the correct, accepted and well-established standards of review as to legal insufficiency—no evidence. We have also endeavored to review the factually insufficient point. We overrule both contentions. *See In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951); R. Calvert, "'*No Evidence*' *and* '*Insufficient*

Evidence' Points of Error", 38 TEXAS L. REV. 361 (1960); W. Garwood, "*The Question of Insufficient Evidence on Appeal*", 30 TEXAS L. REV. 803 (1952).

Furthermore, we perceive that a large part of the work on this shopping center project was, in fact, performed by a draftsman who was not an officially-licensed architect. We are persuaded, under this record, to conclude that the issue of professional liability could be passed on by a jury without the formal declaration of a licensed architect reciting the language contended for by Van Ness. Nevertheless, this is not the paramount holding or reasoning on this point.

The Appellant also challenges and attacks the jury's findings as to Special Issues Nos. 1 (D), 1 (E), 1 (G), on the basis of no evidence and factually-insufficient evidence. Special Issues 1 (D), 1 (E), 1 (G) and the answers are copied above. The Appellee, with candor, concedes that the Appellant was not a seller of tile as that term was defined in TEX. BUS. & COM. CODE Sec. 2.103 (a) (4) (Vernon 1968). Therefore, Special Issue No. 1 (G) should not have been submitted; but we determine this to be harmless error.

We have reviewed the record and conclude that there is evidence of probative force and valuation to sustain the jury's findings to Special Issues Nos. 1 (D) through 1 (E). TEX. BUS. & COM. CODE Sec. 2.103 (a) (4) defines "Seller" as meaning a person who sells or contracts to sell goods. In view of the other issues and answers in this cluster of issues, we determine that Special Issue No. 1 (G) and its submission, were harmless.

It is interesting and significant that there is evidence of probative force that a certain employee of the architectural partnership was, after all the surrounding circumstances, reasonably thought to have been an architect by certain members of the Venture. In fact, the employee was not an architect. The record reflects that some of the

venturers relied upon the non-architect's representation about the "C-Tile". The record also reflects that, had the venturers known that the draftsman was not an architect, they would not have followed his recommendations but rather would have sought expert advice of an architect.

This opinion does not have the desired quality of brevity. Hence, after applying the well-recognized standards of review, we overrule Appellant's Points of Error 5, 6, 7, 8, 12, 13, 14, 15 and 16. Points of Error 5, 6, 7 and 8 attack the legal and factual sufficiency of the jury's answers to Special Issues 1 (D) and 1 (E). Appellant's Points of Error 12 and 13 challenge the answers to Special Issue No. 2. Points of Error 15 and 16 argue both evidentiary insufficiencies (legal and factual) to Special Issue 2 (A). Special Issue 2 asked about the Partnership's negligence if any. Special Issue 2 (A) asked about whether the services of Van Ness pertaining to the "C-Tile" were performed in a good and workmanlike manner. We hold that Appellant's Points of Error Nos. 9, 10 and 11 address a harmless error in submitting Special Issue 1 (G) and these points will not reverse the judgment below nor cause a remand.

The Implied Warranty of Workmanlike Performance

On another tack, the Appellant argues that the implied warranty of good and workmanlike performance of services simply does not apply to the professional services involved. The reasoning, rationale and opinion in *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987), is of special significance. The Supreme Court wrote that the case was a Deceptive Trade Practices-Consumer Protection Act (DTPA) implied warranty cause of action. The jury had awarded discretionary damages. The jury had found a breach of implied warranty in that the repairs were not done in a good and workmanlike manner. The jury found, also, that Melody Home had knowingly breached this implied warranty. Jury findings existed

that Melody Home failed to construct the modular, prefabricated, home in a good and workmanlike manner. The jurors decided this breach was a knowing one.

Based on these findings, the jury awarded $5,000.00 in discretionary damages under the TEX. BUS. & COM. CODE ANN. Sec. 17.50 (b) (1) (Vernon Supp. 1987). The case was appealed to the Fort Worth Court of Appeals for the Second Supreme Judicial District (708 S.W.2d 600). That Court of Appeals held, in substance, that the sale of a service carries with it the implied warranty that the service will be performed in a skillful and workmanlike manner affirming the judgment of the trial court.

The Fort Worth court disallowed the contention of Melody Home that the trial court had committed error in submitting special issues concerning special punitive and discretionary damages and in awarding such damages under the Deceptive Trade Practices Act. The judgment awarded damages and attorney's fees under the Act even though the failure to make repairs in a good and workmanlike manner was not listed in TEX. BUS. & COM. CODE ANN. Sec. 17.46 (b) (Vernon Supp. 1986) nor any place elsewhere in the Act as a Deceptive Trade Practice.

Justice Hill, for the Fort Worth Court, held and reasoned that the sale and furnishing of a service carries with it the implied warranty that the service will be performed in a skillful and workmanlike manner. A further holding was that TEX. BUS. & COM. CODE ANN. Sec. 17.50, as it was amended in 1979, was applicable to the Melody Home case. Neither was it required that an actual finding of a deceptive trade practice was necessary nor that an alleged act be false, misleading or deceptive in nature, as listed under Sec. 17.46 of the Act. Nevertheless, penalty damages were recovered in the case of a breach of an express or implied warranty which had been *knowingly breached.* The affirmance by the Fort Worth Court of Appeals was, in turn, reaffirmed by the Supreme Court of Texas.

The Supreme Court of Texas forcefully noted that, during recent decades, the United States has shifted from a goods oriented to a service oriented economy and that, with this basic change, there has resulted a marked decrease in the quality of services. These stark problems, the high court observed, led that court and the legislature to apply the theory of implied warranty to products, goods and to new houses. The Court reasoned an examination of certain policies favors the extension of the theory of implied warranty to service transactions. The Supreme Court cited the famous Professor Prosser and his article, *The Assault Upon the Citadel*, 69 Yale L.J. 1099, 1120-24 (1960). The Court wrote, in *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987), at pages 353 and 354:

> "First, the public interest in protecting consumers from inferior services is paramount to any monetary damages imposed upon sellers who breach an implied warranty. Second, a service provider is in a much better position to prevent loss than is the consumer of the service. *Many services are so complicated and individually tailored that a consumer is unable to independently determine quality and must depend on the experience, skill, and expertise of the service provider.* [Footnote omitted] *Third, a consumer should be able to rely upon the expertise of the service provider.* The application of implied warranty to services would encourage justifiable reliance on the service providers who would have more incentive to increase and maintain the quality of the services they provide. Fourth, a service provider is better able to absorb the cost of damages associated with inferior services through insurance and price manipulation than is the individual consumer." (Emphasis added)

The Court reaffirmed the writing and reasoning of Justice Norvell in *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968), as follows, at page 561:

> " 'That *court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly,* and which discards the old rule when it finds that another rule of law represents *what should be according to the established and settled judgment of society,* and no considerable property rights have become vested in reliance upon the old rule. * * *' " (Emphasis added)

The record reflects that the Appellant understood and realized that the Joint Venturers were not experienced nor trained in architecture. Because of this real situation, the Joint Venture necessarily had to rely on the advice of its architect.

The Court observed that the legislative history of the DTPA suggests that the Act was intended to apply to all service providers. The Court further noticed that certain proposals to amend the DTPA to exempt insurance agents, brokers and licensed professionals from the coverage of the Act were rejected. The Court wrote in *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d at 354:

> "The question whether an implied warranty applies to services in which the essence of the transaction is the exercise of professional judgment by the service provider is not before us."

But the Court did not disallow such a concept, but quickly observed that attorneys' clients could sue under the DTPA for an attorney's unconscionable actions. In this present litigation, the Supreme Court can squarely settle the issue. We sanguinely decide that the paramount reasoning, rationale and judicial philosophy of *Melody Home Mfg. Co., supra*, possessing and enforcing hegemony over the overall opinion, dictates the result we reach.

Additionally, we note, in *Melody Home Mfg. Co., supra*, that Justice Mauzy concurred in all respects with the majority opinion. Justice Mauzy, previously Senator

Mauzy, was the Senate sponsor of H.B. 417, the relevant legislation. Justice Mauzy wrote, at page 362:

> "Predictability and stability in our law is not to be maintained at the cost of being wrong. Two wrong decisions do not make a right decision. The simple truth of the matter is that the dissent was right in 1985 and the majority was wrong. . . 'Law must be stable and yet it cannot stand still.' Roscoe Pound, *Interpretations of Legal History* 1 (1923)."
>
> . . . .
>
> "We must be willing to expand or limit the law dependent upon the perceived ills of a changing society. We must also be able to review even the most recent of decisions to determine if the rationales contained therein are still appropriate. Any other policy would be to insure a stasis in the laws of this State and would eventually deny the rights of the people whom we represent. . . ."

Following the rationale of the Supreme Court, we are not justified in sustaining Appellant's Point of Error No. 14; it is overruled. Appellant's Point of Error No. 14 reads:

> "The trial court erred in denying Defendant's Motion for Directed Verdict and Defendant's Motion for Judgment Notwithstanding the Verdict and in entering judgment for plaintiff because the implied warranty of good and workmanlike performance does not apply to the professional services involved in this case."

The "Mary Carter" Agreement

The Appellant vigorously argues that the trial court fell into error by refusing to disclose the actual terms of the so-called "Mary Carter" agreement to the jury and in refusing to permit Appellant's counsel to cross-examine a certain witness concerning the "Mary Carter" agreement.

During September of 1988, the Plaintiff below and Gary Clark Contractors, Inc. (a defendant), entered into an agreement. Appellant characterizes it as a "Mary Carter" agreement. Appellant argues that Contractors', Inc., insurer paid to the Plaintiff/Appellee the sum of $100,000.00. Plaintiff/Appellee agreed to prosecute further this action. If successful, Contractors, Inc., would recover one-half of the monies obtained, not to exceed $100,000.00. A timely Motion in Limine was presented to the trial judge by the Plaintiff. The witness involved was Gary Clark. In large measure, Gary Clark's testimony was helpful to the Partnership. Clark was called to the stand by the Van Ness Partnership. Clark testified that the Contractors, Inc., properly supervised its work on the tile and that its work was done properly.

At that point, the counsel for the Partnership endeavored to impeach Clark with the "Mary Carter" agreement, in an effort to show his interest in the outcome of the case and any bias. This line of questions was disallowed. Considering the procedural posture involved, we do not perceive harmful error. But, if such error existed, it was in the nature of invited error on the part of the Partnership. Clark's evidence merely protected his corporation. It was not to the effect that the Appellant had done something wrong. Clark merely stated that his own work was properly done.

The classical rule in our State is that settlement agreements between the plaintiff and a co-defendant are to be excluded from the jury. If the plaintiff releases his cause of action against one joint tort-feasor and makes a promise to pay or to credit the settling tort-feasor (*who actually remains a party at the trial*) with a portion of the recovery obtained; then an exception to this rule is recognized.

Here, Contractors, Inc., was not a party at the trial. *See Clayton v. Volkswagenwerk A.G.*, 606 S.W.2d 15 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd

n.r.e.). The rule has been established that a party-litigant is not entitled to present before the jury otherwise inadmissible evidence merely to discredit or impeach testimony that that party, (here Van Ness), alone, has offered. That is our situation here. The strategy was a type or species in the nature of invited error—if it was error at all. The same cannot result in a reversal. The Van Ness Partnership called Gary Clark. Gary Clark was not in the witness box to promote the Joint Venture's cause against the architectural firm. There was no "ganging up" on the Partnership.

The sole occasion that the evidence given by Gary Clark came into the trial procedure was *because the Appellant called him as a witness.* The rationale for the admissibility of a so-called "Mary Carter" agreement is simply not applicable in this case. There was no basis or reason for the jury being confused. The efficacy of the trial was not endangered. There was no misalignment of parties or misconception of the litigants or their respective positions.

It is also settled that a non-settling defendant may not call a settling defendant in an attempt to offer a "Mary Carter" agreement into evidence on the pretext of impeachment. We overrule Appellants' "Mary Carter" Point of Error No. 17. *See and compare Scurlock Oil Co. v. Smithwick,* 724 S.W.2d 1 (Tex. 1986).

We find no merit in the Appellant's Point of Error No. 18 because of the introduction of certain evidence and various documents without objection. The matters complained of therein were waived. It is also important to note that the testimony was relevant to show that one Arthur Berry was exerting good faith efforts in a bona fide attempt *to lease all the vacant spaces at the shopping center.* Evidence, like a brilliantly-cut diamond, can poss ess several facets of admissibility.

Inasmuch as the monthly note owed by the joint venturers was above $13,000.00 vis-a-vis the actual monthly

rental income of about $6,000.00 was a cogent fact that had probative force to show that Berry's efforts were substantial and vigorous. The Joint Venturers were in the position of being obliged to expend out of their personal monies some figure of around $7,000.00 per month. Hence, Berry had compelling motivation, as did the others, to exert his full efforts to lease all of the non-occupied premises.

David Heldenbrand's Testimony as an Expert

The Appellant further advances that David Heldenbrand's testimony, as an expert, regarding architectural services, was not properly admissible and that the Court abused its discretion in permitting this expert testimony on the issue of whether the architectural services met the applicable and proper standard of care for architects. Heldenbrand's evidence was that he received a bachelor of science degree in biology. He had done actual, practical work for several contractors. He returned to school. He received a degree in civil engineering. He had held numerous, related jobs. He had worked for consulting firms. He had worked on different types of projects, including several concrete construction jobs.

He had had experience looking at tile jobs and also several jobs involving concrete projects and concrete failures therein. He was a member of the American Society of Testing and Materials as well as the National Society of Professional Engineers. He had consulted professional and learned treatises and publications. He was familiar with various characteristics of different types of tiles used in construction. He swore that he had had a good deal of experience with change orders during a project.

He testified that change orders, in his opinion, were incorporated as a part of the basic contract and agreement, if, as and when the change order was approved by the architectural firm.

Heldenbrand stated that his position was that Appellant's conduct and performance in question fell below that correct standard for an architect responsible for an architectural project or an engineering and architectural project. His evidence applied to a construction project as well. We think Heldenbrand was qualified to testify as to the standard of care of architects, this being a non-medical malpractice case. *See Stanley v. Southern Pacific Company*, 466 S.W.2d 548 (Tex. 1971). We conclude that the fields of expertise of engineering and architecture overlap and are intertwined on the questions and issues testified to by Heldenbrand. Certainly Heldenbrand's testimony, and his opinion, were probably helpful and salutary to the triers of fact. TEX. R. EVID. 702. Multiple and overlapping areas of training, schooling, expertise, experience, professionalism, engineering and architecture intertwine, overlay, coincide and intermingle to some significant extent in the area of the tile issue and the installation thereof.

The Lost Rental Income

We disagree with the Appellant that the trial court fell into error by permitting evidence or testimony concerning the lost rental income. The witness was Arthur Berry. He was one of the co-owners of the shopping center. Hence, he could testify as to rentals. He testified to correct calculations. The calculations were based on rentals per square foot. He testified as to the actual collectable rentals, which demonstrated a meaningful difference. Berry was also the individual in charge of leasing the premises and the vacant, unoccupied spaces. He worked on a daily basis. He had experience over a number of years, except for certain brief periods of time, when a local real estate firm was attempting to lease the premises to third-party lessees in behalf of the Venturers. Furthermore, we conclude that the objection made by the Appellant was too general. The objection lacks specificity. We overrule this point of error.

The Attorneys' Fees Issue

Appellant urges a grouping of points that attacks the awards of the attorneys' fees involved in favor of the Joint Venture. The contentions are that the evidence was legally insufficient to establish the reasonableness and necessity of the attorney's fees and, in the alternative, the evidence was not based upon a presentation of the claim. *See and compare Plaza Nat. Bank v. Walker*, 767 S.W.2d 276 (Tex. App.—Beaumont 1989, writ denied). There, our Court made a square ruling, when it was contended that the Plaintiffs failed to allege and prove a written notification under the DTPA, that the petition upon which the Plaintiffs went to trial alleged that all conditions precedent to Plaintiffs['] recovery had been performed or had occurred and when the other party failed to specifically deny that notice; then, the Plaintiffs were simply not required to prove it. *See Plaza Nat. Bank, supra*, at page 278. *See and compare Sanchez v. Jary*, 768 S.W.2d 933 (Tex. App.—San Antonio 1989, no writ); *City of Houston v. Flanagan*, 446 S.W.2d 348 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.).

In *Texas Farmers Ins. Co. v. Hernandez*, 649 S.W.2d 121 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.), the court reasoned *that the stated purpose of the relevant statute was to permit and allow the recovery of a reasonable, usual and customary attorney's fees. Then the court reasoned that a contingent arrangement, and evidence thereof, would support an award of an attorney's fee* under TEX. REV. CIV. STAT. ANN. 2226 (Vernon 1971), repealed Sept. 1, 1985, and now codified as TEX. CIV. PRAC. & REM. CODE ANN. Sec. 38.001 (Vernon 1986), provided that the evidence is admissible and is of sufficient quality and detail to permit the finder of fact to calculate, *reasonably*, the amount of the award.

We find that the evidence is sufficient to show both the necessity for employment of legal counsel and the reason-

ableness of the attorney's fees as well as the reasonableness of the arrangement between the Joint Venturers and their counsel. We conclude, then, that the jury's award, concerning the attorney's fees, was reasonable, based on usual and customary attorney's fees in like cases.

Concerning the presentment contention, we must emphasize this appeal is similar and parallel to the situation in *Plaza Nat. Bank v. Walker*, 767 S.W.2d 276 (Tex. App.—Beaumont 1989, writ denied). In that case, we were presented with a point of error arguing that a party had failed to present a timely notice of his claim. Therefore, that party was not entitled to recover attorney's fees under either the DTPA or Section 38.001, et seq. of the Texas Civil Practices and Remedies Code. In Walker's case, as in the case at bar, the Appellees had proceeded to trial upon allegations that all conditions precedent had been performed or had occurred.

The Appellees' pleadings here are virtually the same. Our Court determined that the Appellant bank, Plaza National, had failed to specifically deny the notice. Hence, Walker was not required to prove it. We adhere to *Plaza Nat. Bank, supra*, and overrule this contention. *See and compare Sanchez v. Jary*, 768 S.W.2d 933 (Tex. App.—San Antonio 1989, no writ); TEX. R. CIV. P. 93 and 94.

Prejudgment Interest

The last three points urged by the Appellant advanced that the trial court erred in awarding prejudgment interest on the cost of repair damages and that the trial court erred in awarding prejudgment interest on the lost rental income damages. Also, Appellant insists the court erred in measuring such prejudgment interest at the rate of 10% per annum. The trial court allowed prejudgment interest from March 16, 1984, being six months after the date of the change order. Change order No. 3 was the change order in question. The No. 3 change order, itself, was of September 16, 1983. Change order No. 3

was directly relevant to "C-TILE". These damages were economic. This type of prejudgment interest is recoverable. *See Perry Roofing Co. v. Olcott*, 744 S.W.2d 929 (Tex. 1988); *Rio Grande Land & Cattle Co. v. Light*, 758 S.W.2d 747 (Tex. 1988); *City of Houston v. Wolfe*, 712 S.W.2d 228 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd). In *Liquid Energy v. Trans-Pan Gathering*, 758 S.W.2d 645 (Tex. App.—Amarillo 1988, case later settled), the Amarillo Court acknowledged that it had held that Cavnar's rationale, [*see Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985)], to allow recovery for equitable prejudgment interest had been extended to include breach of contract actions even for unascertainable damages. We quote from *Liquid Energy, supra*, at page 662:

> "In its sixth point, LEC [Liquid Energy Corporation] complains that the trial court erred in awarding prejudgment 'Cavnar' interst [sic] of ten per cent (10%) per annum on contractual damages awarded appellees. Although appellees requested only six per cent (6%) prejudgment interest in their proposed judgment, the trial court, following *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), awarded ten percent per annum prejudgment interest.
>
> "Both appellant and appellees acknowledge in their briefs that the Texas Supreme Court's holding in *Perry Roofing Company v. Olcott*, 722 S.W.2d 538 (Tex. App.—Fort Worth 1986), *aff'd*, 744 S.W.2d 929, 930-31 (Tex. 1988) is dispositive of this point. The Court recently held in *Perry Roofing* that *Cavnar's* rationale to allow recovery for equitable prejudgment interest is correctly extended to application in breach of contract actions for unascertainable damages. *Id.* Thus, the trial court's action in awarding ten per cent (10%) per annum prejudgment interest in this case was correct. Appellant's final point is overruled."

The Transcript of the Evidence or Statement of Facts Issue

Appellant's Point of Error No. 1 is that the trial court erred in overruling Defendant's Amended Motion for New Trial and in refusing to grant a new trial because it is averred that the Defendant, due to no fault of its own, could not obtain a properly certified, verbatim transcript of the evidence, in question and answer form. We determine that this first point of error lacks merit. The argument is that a portion of the trial was reported by a court reporter who, at the time, was not certified. The Appellant brings forward certain relied-upon cases.

In one case, *there was no Statement of Facts presented to the Appellate Court. Walzem, Inc. v. Romano*, 592 S.W.2d 20 (Tex. Civ. App.—Beamount 1979, no writ). In another case, *there was no Statement of Facts brought forward because of the fact that the official court reporter's notes were lost. Flowers v. Flowers*, 585 S.W.2d 334 (Tex. Civ. App.—Dallas 1979, no writ). In yet another case, *the court reporter had, through inadvertence, disposed of, or thrown away, his stenographic notes and could not prepare a statement of facts.* The cases relied upon by Appellant are meaningfully different from the record on this appeal.

There is a lengthy Statement of Facts in this record. We think the Appellant has not actually demonstrated that any question or answer therein was incorrectly reported. There was an audio tape made at trial. The trial took place in December of 1988. The first brief of Appellant was filed in November of 1989. During that period of time, the Appellant did not point out a factual discrepancy or mistake in the record. In fact, Appellant insists that, because the court reporter was uncertified, the Judgment should be summarily reversed and the cause of action summarily remanded for a new trial. We disagree. From our examination of the record, we perceive the same was correct and proper. Certainly,

it was totally sufficient to allow the parties to prepare and correctly and excellently brief many points of error and many reply points. Appellant was certainly able to file an excellent Reply Brief.

Defendant/Appellant concedes, in its brief, that the reporter's notes and the audio tapes of the roving reporter were made and recorded during the trial. They were fully available. Also, they were available to the official court reporter of the 58th District Court and to the roving court reporter. The roving court reporter prepared Volumes 3 and 4 of the Statement of Facts. Again, Defendant/Appellant argues that these volumes are not true and correct. Defendant/Appellant does not attack any specific portion or question and answer in these volumes.

We conclude that if the roving court reporter situation created any error, it was harmless; it was certainly not reversible error. The reason is that no specific complaint has been made by the Defendant/Appellant about any part of the record or the statement of facts taken down, and transcribed, by the roving court reporter. Furthermore, it is very clear that there existed no error on the part of the District Judge inasmuch as the roving court reporter—the uncertified one—had been assigned to his court by the Presiding Judge under the local rules. The trial judge had no knowledge of the status of the roving court reporter. Indeed, the roving court reporter had been a substitute court reporter for about two years in the various courts of Jefferson County. Hence, the trial judge was not at fault in any way. Nor has the Defendant/Appellant specifically claimed or demonstrated any wrong or errors in the transcriptions of the testimony. Nor has the Defendant/Appellant shown any error or mistake in the work of the roving court reporter.

The dissent strongly relies on *Rogers v. Rogers*, 561 S.W.2d 172 (Tex. 1978). That case is meaningfully dif-

ferent. It is certainly not controlling or even parallel. *Rogers, supra*, involved a default divorce judgment. The default judgment appointed Mrs. Rogers as managing conservator of the couple's infant son and made other important orders affecting the parent-child relationship. No statement of facts was brought forward. Mr. Rogers was unable to obtain any statement of facts. The Supreme Court held that TEX. FAM. CODE ANN. sec. 11.14 (d) (Vernon 1988) required a record to be made in all suits affecting the parent-child relationship unless waived by all the parties with the consent of the trial court. *Rogers, supra*, is not in point. The dissent cites *Soto v. State*, 671 S.W.2d 43 (Tex. Crim. App. 1984). *Soto, supra*, was a criminal proceeding. The trial court denied Soto's motion to have the court reporter take down the proceedings. Instead, an order was entered for the county clerk to tape record the proceedings. Later, a deputy county clerk took over. *Soto, supra*, is inapposite. In *Weaver v. Westchester Fire Ins. Co.*, 739 S.W.2d 23 (Tex. 1987), Ray Weaver, in a workers' compensation action, filed a motion for a new trial, alleging improper outside influences had been unlawfully brought to bear upon the jury. The motion was supported by an affidavit. Weaver filed a written request for a court reporter to take down the testimony offered in support of his motion. The trial court affirmatively refused Weaver's request. A hearing was conducted. At the conclusion thereof, the motion for new trial was properly overruled. We see that many of these cases relied upon for a reversal were cases in which the trial judge refused to permit any court reporter to be present. Judge Ron Walker never refused any party the right to have a record made. The dissent concedes that a harsh result would take place if a reversal was ordered; and that a reversal herein would be because of a non-compliance with a "technical" rule.

Karen L. Beggs, a stenographic court reporter, did certify that the pages of typewritten material prepared by her contained a true and correct copy of the proceed-

ings conducted on December 6, 7 and 8, 1988, and that all of "the above and foregoing pages" were transcribed from her verbatim shorthand notes by her and "constitutes a complete record of all the proceedings" that she (Karen L. Beggs) personally wrote in machine shorthand during the trial of this case. We must pose this query: Why did Defendant/Appellant fail to have an independent, certified, official court reporter review and transcribe Beggs' verbatim shorthand notes in an effort to reveal mistakes, if any? Second query: Why did the Defendant/Appellant fail to have an independent, certified, official court reporter carefully listen to, audit and transcribe Beggs' audio tapes? We overrule Defendant's/Appellant's Point of Error No. 1.

Appellee presents and argues, with authorities, one cross point. The cross point contends that the District Court erred in providing for a $41,000.00 credit. Basically, Appellee argues that the District Court improperly calculated the amount of the credit and that no credit at all should have been granted to Appellant. We conclude that *Hunt v. Ellisor & Tanner, Inc.*, 739 S.W.2d 933 (Tex. App.—Dallas 1987, writ denied) sustains Appellee's cross point. Of course, we do not have before us the contract between the architect and Hunt but, from that opinion, we conclude that the agreement between the owner and the architects in our case is very similar, if not more desirable, to the owners. In the printed agreement between the Joint Venture and Van Ness, Paragraph 1.5.4 was amended. The amendment provided, in substance, that the architect shall make on-site inspections of the work at appropriate intervals to become familiar with the progress of the work, to evaluate the quality of the work and to determine if the work is proceeding according to the contract documents. And if any work of the contractor is defective, deficient or not in accordance with the plans and specifications, the same shall be reported to the owner. The architect shall endeavor to guard against defects and deficiencies in the work and the architect

shall promptly reject any defective or deficient work of the contractor. Notice that the mandatory and the obligatory verb "shall" is used four times and dominates the amended Paragraph 1.5.4. Hence, we think the contract and agreement at bar is more beneficial to the owners.

In *Hunt, supra,* the jury found that the architectural firm had breached its contractual obligations and provisions. The jury awarded $41,500.00. The jury determined that Ellisor & Tanner (as architects) caused five (5%) percent of the $41,500.00 damages.

Justice Whitham, in a paragraph entitled "Disposition", reversed the trial court's judgment and rendered judgment in favor of the owners against the architects in the full sum of $41,500.00 together with interest thereon at the rate of 10% per annum. The trial court had rendered judgment against the architects for only $2,075.00, being five (5%) percent of the damage award. *Id.*

The Dallas Court of Appeals decided that it was incorrect to apply comparative causation. The Court's rationale was that the architect's obligations were nonconstructive but the general contractor's obligations were constructive in nature.

In *Hunt, supra,* the architects, Ellisor and Tanner, maintained that the principles enunciated in *Duncan v. Cessna Aircraft, Inc.*, 665 S.W.2d 414 (Tex. 1984), and the contract between the parties dictated a reduction in the damage award against them. Justice Whitham wrote, in *Hunt, supra,* at page 938:

> "Consequently, we first consider the applicability of *Duncan.* We conclude that *Duncan* is inapplicable to the present case. We reach this conclusion because *Duncan* involved negligence mixed with strict liability. The present case, however, presents an action for breach of contract in which Hunt-Stephens sues for damages because it did not obtain the services

that Ellisor & Tanner promised to deliver. In this connection, we note that a source relied upon by the Supreme Court in formulating its opinion in *Duncan* negates *Duncan's* application to the present case. The Supreme Court cited the Uniform Comparative Fault Act sec. 1, 12 U.L.A. 38 (Supp. 1986). *Duncan*, 665 S.W.2d at 428, 430. The Act, however, excludes breach of contract cases from the doctrine of comparative causation. Uniform Comparative Fault Act at sec. 1(b). The comments below that section provide as follows:

> "An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive.

"12 U.L.A. at 40. We conclude, therefore, that when the situation is pure contract, the special issues should not include comparative causation. *See* 5 A. Corbin, *Corbin on Contracts* secs. 999-1,000 (1964). Professor Corbin states in footnote 21 of section 999:

> "In the contract field, however, if the acts of others (whether wrongful or not) are contributing factors, those others are not thereby joined with the defendant as having committed the breach of the contract.

"At most, Ellisor & Tanner argues that the general contractor 'contributed' to Hunt-Stephens' damages, but was not the 'sole' cause. Professor Corbin would hold such a defendant responsible for the *total* harm suffered even though there were contributing factors to the defendant's conduct. 5 *Corbin on Contracts* at sec. 999. Thus, we conclude that Hunt-Stephens is not required to show the proportionate fault of

each wrongdoer, but must show that Ellisor & Tanner's breach was a substantial factor. Hunt-Stephens obtained such a finding from the jury in the present case when, in answer to special issue number two, the jury found that Ellisor & Tanner's breach was a producing cause of Hunt-Stevens' damages. Hence, we decline to extend *Duncan* to the present case."

We are convinced that the *Hunt* decision is dispositive of Appellee's cross point. The Joint Venture fulfills the test pronounced in *Hunt* that the architect's breach was a substantial factor. Hence, no credit should have been given. The $41,000.00 credit granted by the trial court in favor of Appellant is therefore disallowed. The judgment is reformed to restore to the Appellees this $41,000.00. The judgment, as reformed, is affirmed. Appellees' Cross Point No. 1 and Appellees' relevent Reply Point No. 25 are sustained.

The demonstrative and pictorial evidence in this case is cogent and significant. Pictures, at times, can be equivalent to thousands of words. We have attached some of the photographic evidence involving the "C-Tile". This photographic evidence was admitted without objection.

Judgment reformed and, as reformed, affirmed.

JUDGMENT REFORMED AND AFFIRMED.

JACK BROOKSHIRE
Justice

Opinion delivered
September 6, 1990.

Publish.

Panel consists of Brookshire, J., Burgess, J. and Smith, J., Ret.[1]

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[1] The Honorable Jackson B. Smith, Jr., retired, Court of Appeals, First District at Houston, sitting by assignment.

DISSENTING OPINION

I respectfully dissent to the disposition of point of error number one. The majority states "From our examination of the record, we perceive the same was correct and proper." What the majority does not state is that only two volumes of the statement of facts have been certified by the official court reporter while two other volumes contain no certification by *an official court reporter.* **Rule 53(f) Certification by Court Reporter,** Texas Rules of Appellate Procedure states: "The statement of facts shall be in sufficient form to be filed in the appellate court when *it is certified by the official court reporter* (emphasis added)."

The rule as stated in *Rogers v. Rogers,* 561 S.W.2d 172 (Tex. 1978) is: "if an appellant exercises due diligence and through no fault of his own is unable to obtain a proper record of the evidence introduced, this may require a new trial where his right to have the case reviewed on appeal can be preserved in no other way." Furthermore, appellant is not required to seek out any agreed statement of facts to avail himself of the rule. *Weaver v. Westchester Fire Ins. Co.,* 739 S.W.2d 23 (Tex. 1987); *Vickers v. Sunrise Lumber Co.,* 759 S.W. 2d 747 (Tex. App.—El Paso 1988, writ denied).

For this court to sanction the filing of a statement of facts by an uncertified court reporter would potentially undermine the court reporter certification requirements in TEX. GOV'T CODE ANN. secs. 52.021-.033 (Vernon 1988 & Supp. 1990), and the official court reporter appointment procedures in TEX. GOV'T CODE ANN. secs. 52.041-.048 (Vernon 1988 & Supp. 1990).

I will be the first to concede that a reversal and remand is a harsh result especially since neither party nor the trial judge was at fault. However, this is generally the case in improper, incomplete or no record cases. The substitute court reporter had apparently misrepresented her

certification to whoever approved her employment as the "roving" court reporter. Still, the absence of fault and the harshness of the result does not make the court reporter certified nor does it make the record any more proper. In terms of the rules and statutes, since she was not a certified court reporter, she was no more than a bystander. *See Soto v. State*, 671 S.W.2d 43 (Tex. Crim. App. 1984) where the court reversed and remanded a misdemeanor assault case when the record was prepared by a deputy county clerk rather than a certified court reporter.

It is with no pleasure that I suggest a case, which has been fully and fairly tried by a jury, be reversed because of non-compliance with a "technical" rule. However, the integrity of the system dictates that appellate records meet minimum requirements, one of which is a statement of facts certified by an official court reporter. One of the prerequisites of being an official court reporter is to be certified. Since part of the statement of facts in this case does not meet these requirements, I would reverse and remand for a new trial. Since the majority does not, I respectfully dissent.

DON BURGESS
Justice

Dissent Delivered
September 6, 1990
Publish

APPENDIX C

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
58TH JUDICIAL DISTRICT

No. A-124,883

MAJOR-GLADYS DRIVE JOINT VENTURE

VS.

GARY CLARK CONTRACTORS, INC., *et al.*

FINAL JUDGMENT

On the 5th day of December, 1988, came on to be heard the above-entitled and numbered cause of action at which time Plaintiff, MAJOR-GLADYS DRIVE JOINT VENTURE, Defendant THE WHITE BUDD VAN NESS PARTNERSHIP, and Defendant GARY CLARK CONTRACTORS, INC. appeared by and through their respective attorneys of record, and all parties announced ready for trial;

WHEREUPON a jury of twelve (12) men and women were duly tested, selected, impaneled and sworn, and the trial proceeded with the reading of the opening statements and the introduction of evidence, until the 7th day of December, 1988, at which time the evidence on behalf of all parties having been completed, and the parties having rested their respective cases, the Court prepared the charge of the Court and the parties made their objections and acceptance to the charge; and

WHEREUPON, the jury was charged by the Court, counsel for all parties presented their arguments, and the case was duly sent to the jury; the jury having duly retired and deliberated, reached a unanimous verdict herein, and returned the same unto the Court as provided by law

on the 8th day of December, 1988. The verdict of the jury was duly received by the Court and was filed among the papers of this cause, and the jury was discharged. The Special Issues submitted by the Court to the jury, in pertinent part, and the jury's responses thereto, were as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the Defendant, WHITE BUDD VAN NESS PARTNERSHIP committed any of the following acts which were a producing cause of damages, if any, to Plaintiff?

A. Represented that the "C-Tile" and/or the architectural services had sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities, which it did not have.

ANSWER "WE DO" or "WE DO NOT":

ANSWER: *WE DO*

B. Represented that the "C-Tile and/or the architectural services were of a particular standard, quality, or grade which it was not.

ANSWER "WE DO" or "WE DO NOT":

ANSWER: *WE DO*

C. Represented that the architectural agreement conferred or involved rights, or remedies which it did not have.

ANSWER "WE DO" or "WE DO NOT":

ANSWER: *WE DO*

D. Failed to disclose to Plaintiff information concerning the "C-Tile" and/or architectural services which was known at the time of the execution of Change Order No. 3, when such failure to inform Plaintiff of such information was intended to induce the Plaintiff into

such transaction which the Plaintiff would not have entered into if such information had been disclosed.

ANSWER "WE DO" or "WE DO NOT":

ANSWER: *WE DO*

E. Engaged in any unconscionable action or course of action.

ANSWER "WE DO" or "WE DO NOT":

ANSWER: *WE DO*

F. Furnished or selected tiles that was not fit for the ordinary purposes for which tile is used.

ANSWER "WE DO" or "WE DO NOT":

ANSWER: *WE DO NOT*

G. Approved tile that was not suitable for the purpose for which the tile was to be used, while having reason to know of such purpose and of Plaintiff's reliance on the Defendants' skill or judgment to approve suitable tile.

ANSWER "WE DO" or "WE DO NOT":

ANSWER: *WE DO*

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that Defendant WHITE BUDD VAN NESS PARTNERSHIP, breached its contract with Plaintiff, which was a proximate cause of damages, if any, to Plaintiff?

In order to find a breach of contract by the Defendant, WHITE BUDD VAN NESS PARTNERSHIP, you must find from a preponderance of the evidence that the Defendant, WHITE BUDD VAN NESS PARTNERSHIP, was negligent in performing the services under its contract in one or more of the following matters: Answer: "WE DO" or "WE DO NOT" for each of the following:

		ANSWER
A.	Investigation of the tile	*WE DO*
B.	Advising Plaintiff as to the tile's proper use	*WE DO*
C.	Preparation of plans and specifications	*WE DO*
D.	Inspections of installations of the tile	*WE DO*

SPECIAL ISSUE 2A

Do you find from a preponderance of the evidence that the Defendant WHITE BUDD VAN NESS PARTNERSHIP failed to perform the architectural services pertaining to the C-Tile in a good and workmanlike manner?

ANSWER "WE DO" or "WE DO NOT":

ANSWER: *WE DO*

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that GARY CLARK CONTRACTORS, INC. was negligent? Answer "Yes" or "No" with respect to each of the following matters:

		ANSWER
A.	Recommendations of the tile	*NO*
B.	Investigation of the tile	*NO*
C.	Advising Plaintiff as to the tile's proper uses	*NO*
D.	Installation of the tile	*YES*

SPECIAL ISSUE NO. 4

If you have answered any subdivision of Special Issue No. 3 "Yes", and only in that event, then answer "Yes" or "No" to the corresponding subdivision of Special Issue No. 4.

Do you find from a preponderance of the evidence that such negligence was a proximate cause of damage to Plaintiff?

		ANSWER
A.	Recommendation of the tile	*NO*
B.	Investigation of the tile	*NO*
C.	Advising Plaintiff as to the tile's proper uses	*NO*
D.	Installation of the tile	*YES*

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that GARY CLARK CONTRACTORS, INC. was a "merchant" at the time he sold the tile to Plaintiff? Answer "Yes" or "No".

ANSWER: *NO*

SPECIAL ISSUE NO. 6

If you have answered Special Issue No. 5 "Yes", and only in that event, then answer Special Issue No. 6.

Do you find from a preponderance of the evidence that the tile supplied by GARY CLARK CONTRACTORS, INC. for exterior use was unfit for the ordinary purposes for which such tile is used? Answer "Yes" or "No".

ANSWER: *UNANSWERED*

SPECIAL ISSUE NO. 7

If you have Special Issue No. 6 "Yes", and only in that event, then answer Special Issue No. 7.

Do you find from a preponderance of the evidence that the unfit condition of the tile was a proximate cause of damage to Plaintiff? Answer "Yes" or "No".

ANSWER: *UNANSWERED*

SPECIAL ISSUE NO. 8

If you have answered Special Issue No. 7 "Yes", and only in that event, then answer Special Issue No. 8.

Do you find from a preponderance of the evidence that at the time of contracting with Plaintiff for the purchase of the tile, GARY CLARK CONTRACTORS, INC. had reason to know the particular purpose for which the tile was required? Answer "Yes" or "No".

ANSWER: *UNANSWERED*

SPECIAL ISSUE NO. 9

If you have answered Special Issue No. 8 "Yes", and only in that event, then answer Special Issue No. 9.

Do you find from a preponderance of the evidence that at the time of contracting with Plaintiff for the purchase of the tile, GARY CLARK CONTRACTORS, INC. had reason to know that Plaintiff was relying on GARY CLARK CONTRACTORS, INC.'s skill or judgment to select or furnish a suitable exterior tile? Answer "Yes" or "No".

ANSWER: *UNANSWERED*

SPECIAL ISSUE NO. 10

If you have answered Special Issue No. 9 "Yes", and only in that event, then answer Special Issue No. 10.

Do you find by a preponderance of the evidence that the tile supplied by GARY CLARK CONTRACTORS, INC. was unfit for the particular purpose for which it was purchased? Answer "Yes" or "No".

ANSWER: *UNANSWERED*

SPECIAL ISSUE NO. 11

If you have answered Special Issue No. 10 "Yes", and only in that event, then answer Special Issue No. 11.

Do you find by a preponderance of the evidence that the unfit condition of the tile supplied by GARY CLARK CONTRACTORS, INC. was a proximate cause of damage to Plaintiff? Answer "Yes" or "No."

ANSWER: *UNANSWERED*

SPECIAL ISSUE NO. 12

Do you find by a preponderance of the evidence that GARY CLARK CONTRACTORS, INC. failed to comply with its agreement with Plaintiff? Answer "Yes" or "No."

ANSWER: *YES*

SPECIAL ISSUE NO. 13

If you have answered Special Issue No. 12 "Yes", and only in that event, then answer Special Issue No. 13.

Do you find by a preponderance of the evidence that GARY CLARK CONTRACTORS, INC.'s failure to comply with the agreement with Plaintiff was a proximate cause of damage to Plaintiff? Answer "Yes" or "No."

ANSWER: *Yes*

SPECIAL ISSUE NO. 14

If in answers to Special Issue Nos. 1, 2, 2a, 4, 7, 11 and 13 you found that more than one party's acts or omissions caused damage to Plaintiff, and only in that event, then answer Special Issue No. 14.

In answering Special Issue No. 14, you are instructed that the percentage of causation attributable to a party is not necessarily measured by the number of acts or omissions found. The percentages you find must total 100%.

For each party found by you to have caused damage to Plaintiff, find the percentage caused by:

GARY CLARK CONTRACTORS, INC.	20%
The White Budd Van Ness Partnership	80%
TOTAL:	100%

SPECIAL ISSUE NO. 15

Find from a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for its damages, if any.

Consider the following elements of damage, if any, and none other. Do not include in your answer any amount that you find Plaintiff could have avoided by the exercise of reasonable care. Answer in dollars and cents with respect to each element of damage, if any.

	AMOUNT, IF ANY
A. Reasonable and necessary cost to repair the tile	$105,000.00
B. Lost rental income	$100,000.00

SPECIAL ISSUE NO. 16

If you have answered Special Issue No. 1 or any subpart thereof "We Do", then answer Special Issue No. 16; otherwise do not answer Special Issue No. 16.

Do you find from a preponderance of the evidence that the Defendant WHITE BUDD VAN NESS PARTNERSHIP either (1) knowingly made any of the representations or (2) knowingly engaged in the conduct inquired about in Special Issues No. 1?

ANSWER "WE DO" or "WE DO NOT":

ANSWER: *WE DO*

If you have answered Special Issue No. 16, "We Do", then answer Special Issue No. 17; otherwise do not answer Special Issue No. 17.

What sum of money, if any, do you find from a preponderance of the evidence, should be awarded against Defendant WHITE BUDD VAN NESS PARTNERSHIP as additional damages?

ANSWER IN DOLLARS AND CENTS, IF ANY:

ANSWER: *$100,000.00*

SPECIAL ISSUE NO. 18

What sum of money, if any, do you find to be a reasonable and necessary attorney's fee for the services by Plaintiff's attorney as follows:

A. For legal services rendered in the preparation and trial of this cause in this Court?

ANSWER IN DOLLARS AND CENTS, IF ANY:

ANSWER: *$120,000.00*

B. For legal services if this case is appealed to the Court of Appeals?

ANSWER IN DOLLARS AND CENTS, IF ANY:

ANSWER: *$5,000.00*

C. For legal services for making or responding to an Application For Writ of Error to the Supreme Court of Texas?

ANSWER IN DOLLARS AND CENTS, IF ANY:

ANSWER: *$5,000.00*

D. For legal services if the Application For Writ of Error is granted by the Supreme Court of Texas?

ANSWER IN DOLLARS AND CENTS, IF ANY:

ANSWER: *$5,000.00*

IT APPEARS to the Court that from the verdict of the jury, and the law applicable thereto, that a judgment should be rendered in favor of Plaintiff, MAJOR-GLADYS DRIVE JOINT VENTURE, against Defendant, THE WHITE BUDD VAN NESS PARTNERSHIP, upon Plaintiff's cause of action pursuant to the terms and pro-

visions of the Texas Deceptive Trade Practice-Consumer Protection Act, and Plaintiff's cause of action for breach of contract.

IT FURTHER APPEARS to the Court that Plaintiff had previously, prior to the commencement of trial herein, fully compromised and settled its cause of action against Defendant GARY CLARK CONTRACTORS, INC., and that Plaintiff has previously taken a non-suit against Defendant GARY CLARK CONTRACTORS, INC., in connection with same.

IT FURTHER APPEARS to the Court, that prior to the commencement of trial herein, Plaintiff requested and received a partial non-suit against Defendant THE WHITE BUDD VAN NESS PARTNERSHIP in connection with Plaintiff's cause of action for negligence. It is therefore, ORDERED, ADJUDGED AND DECREED:

1. That Plaintiff recover from Defendant THE WHITE BUDD VAN NESS PARTNERSHIP the sum of TWO HUNDRED FIVE THOUSAND AND NO/100 ($205,000.00) DOLLARS, in Plaintiff's actual damages, in connection with Plaintiff's cause of action pursuant to the terms and provisions of the Texas Deceptive Trade Practices-Consumer Protection Act, and for breach of contract;

2. That Plaintiff recover from Defendant THE WHITE BUDD VAN NESS PARTNERSHIP the additional sum of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS pursuant to Section 17.50(b)(1) of the Texas Deceptive Trade Practices-Consumer Protection Act;

3. That Plaintiff recover from Defendant THE WHITE BUDD VAN NESS PARTNERSHIP the additional sum of ONE HUNDRED THOUSAND AND NO/100 ($100,000.00) DOLLARS, pursuant to the terms and provisions of Section 17.50(b)(1) of the Texas Deceptive Trade Practices-Consumer Protection Act, in that said

Defendant's actions were found to have been committed "knowingly", and were found to have been "unconcionable", as those terms are defined in accordance with Section 17.45;

4. IT IS FURTHER ORDERED by the Court that Plaintiff recover from Defendant THE WHITE BUDD VAN NESS PARTNERSHIP, the sum of ONE HUNDRED THIRTY-FIVE THOUSAND AND NO/100 ($135,000.00) DOLLARS as attorney's fees; and, if this cause is not appealed, the judgment for attorney's fees will be credited with FIFTEEN THOUSAND AND NO/100 ($15,000.00) leaving a recovery of attorney's fees of ONE HUNDRED TWENTY THOUSAND AND NO/100 ($120,000.00) DOLLARS; and, if this cause is appealed to the Court of Appeals, but the appeal is not carried to the Supreme Court by appeal or writ of error, the judgment for attorney's fees will be credited with TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS, leaving a recovery of attorney's fees of ONE HUNDRED TWENTY-FIVE THOUSAND AND NO/100 ($125,000.00) DOLLARS; and, if application for writ of error is made and such application is denied, dismissed, or refused, the judgment for attorney's fees will be credited with FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS, leaving a recovery of attorney's fees of ONE HUNDRED THIRTY THOUSAND AND NO/100 ($130,000.00) DOLLARS; and, if the Supreme Court of Texas grants the application for writ of error, the judgment for attorney's fees will be credited with zero (0), leaving a recovery of attorney's fees of ONE HUNDRED THIRTY-FIVE THOUSAND AND NO/100 ($135,000.00) DOLLARS;

5. IT IS FURTHER ORDERED by the Court that Plaintiff recover from Defendant THE WHITE BUDD VAN NESS PARTNERSHIP, pre-judgment interest, at the rate of ten (10%) percent per diem from March 16, 1984 (same representing six (6) months after the date

Change Order No. 3 was entered, September 16, 1983), to December 14, 1988, in the amount of ONE HUNDRED TWENTY-SEVEN THOUSAND ONE HUNDRED FIFTY-SEVEN AND 40/100 ($127,157.40) DOLLARS with pre-judgment interest continuing to accrue at the rate of NINETY AND 24/100 ($90.24) DOLLARS per day until the judgment is signed;

6. IT IS FURTHER ORDERED by the Court that Plaintiff recover from Defendant THE WHITE BUDD VAN NESS PARTNERSHIP post-judgment interest in the amount of ten (10%) percent per annum on all the above amounts;

7. IT IS FURTHER ORDERED by the Court that all costs of Court in this cause be taxed against Defendant, THE WHITE BUDD VAN NESS PARTNERSHIP, for all of which let execution issue if not timely paid.

IT IS FURTHER ORDERED that Defendant THE WHITE BUDD VAN NESS PARTNERSHIP is entitled to a twenty (20%) percent credit, in the amount of FORTY-ONE THOUSAND AND NO/100 ($41,000.00) DOLLARS, same representing twenty (20%) percent of Plaintiff's total recovery of actual damages.

SIGNED AND ENTERED THIS 16th DAY OF DECEMBER, 1988.

R. Walker

RONALD L. WALKER
Judge
58th District Court

APPENDIX D

IN THE SUPREME COURT OF TEXAS

March 20, 1991

No. D-0502

WHITE BUDD VAN NESS PARTNERSHIP

v.

MAJOR-GLADYS DRIVE JOINT VENTURE

From JEFFERSON County, 9th District

ORDER

On January 24, 1991, this Court overruled Petitioner's motion to permit a brief in excess of the page limit fixed by Rule 131(i) of the Texas Rules of Appellate Procedure. Petitioner then submitted a revised application; but because the application still did not comply with the Rules of Appellate Procedure, the Court ordered the application redrawn. Tex. R. App. P. 131(j). Petitioner has since submitted another redrawn application. Although the redrawn application technically achieves compliance with the fifty-page limit, it does so only through reduction of print size and diminution of margins, rendering the application difficult to read. This violates the spirit of Rule 131(i), if not the letter of the rule. Because Petitioners' redrawn application fails to conform to the requirements of Rule 131(i), Tex. R. App. P., we strike Petitioners' Application for Writ of Error and the same is dismissed.

* * * *

April 17, 1991

FROM JEFFERSON COUNTY, 9TH DISTRICT

No. D-0502

WHITE BUDD VAN NESS PARTNERSHIP

v.

MAJOR-GLADYS DRIVE JOINT VENTURE

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

* * * *

APPENDIX E

IN THE TEXAS SUPREME COURT

No. D-502

WHITE BUDD VAN NESS PARTNERSHIP,
Petitioner

vs.

MAJOR-GLADYS DRIVE JOINT VENTURE,
Respondent

MOTION FOR REHEARING

HARRY M. REASONER
GUY S. LIPE
EWING WERLEIN, JR.
J. CLARK MARTIN
VINSON & ELKINS
3200 First City Tower
1001 Fannin
Houston, Texas 77002-6760
Attorneys for Petitioner,
The White Budd Van Ness
Partnership

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Tex. R. Civ. P. 1 .....

NAMES OF ATTORNEYS OF RECORD

Attorneys for Petitioner, The White Budd Van Ness Partnership (Defendant in the trial court, Appellant in the Court of Appeals, and Petitioner herein):

Harry M. Reasoner
Guy S. Lipe
Ewing Werlein, Jr.
J. Clark Martin
Vinson & Elkins
3200 First City Tower
1001 Fannin
Houston, Texas 77002-6760

Attorneys for Respondent, Major Gladys Drive Joint Venture (Plaintiff in the trial court, Appellee in the Court of Appeals, and Respondent herein):

Jon Burmeister
Moore, Landrey, Garth & Jones
285 Liberty, Suite 1900
Beaumont, Texas 77701

IN THE SUPREME COURT OF TEXAS

No. D-502

WHITE BUDD VAN NESS PARTNERSHIP,
Petitioner

vs.

MAJOR-GLADYS DRIVE JOINT VENTURE,
Respondent

MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

The White Budd Van Ness Partnership respectfully submits this Motion for Rehearing of this Court's Order dated March 20, 1991, dismissing the Application for Writ of Error for violation of the Court's briefing instructions.

POINTS ON REHEARING

POINT NO. 1

COUNSEL FOR PETITIONER BELIEVED IN GOOD FAITH THAT THE FIRST REDRAWN APPLICATION FOR WRIT OF ERROR COMPLIED WITH RULE 131(i), TEXAS RULES OF APPELLATE PROCEDURE, BECAUSE RULE 131(i) PROVIDES THAT PAGES CONTAINING POINTS OF ERROR ARE TO BE EXCLUDED IN DETERMINING COMPLIANCE WITH RULE 131(i), BECAUSE THE TEXAS RULES OF APPELLATE PROCEDURE DO NOT CONTAIN

ANY PROHIBITION AGAINST USE OF THE TYPE SIZE AND MARGINS UTILIZED THEREIN, AND BECAUSE COUNSEL FOR PETITIONER BELIEVED THE PRINT SIZE AND MARGINS UTILIZED TO BE REASONABLE.

POINT NO. 2

THE COURT INSTRUCTED COUNSEL FOR PETITIONER ON FEBRUARY 12, 1991, TO REDRAW ITS FIRST REDRAWN APPLICATION PURSUANT TO RULE 131(j). WITHOUT CHANGING THE TYPE OR MARGINS, COUNSEL REDREW THE APPLICATION DELETING 6½ PAGES (REDUCING IT FROM 52 PAGES, INCLUDING POINTS OF ERROR, TO 45½ PAGES, INCLUDING POINTS OF ERROR). COUNSEL HAD NOT BEEN ADVISED BY THE COURT OR THE CLERK'S OFFICE THAT THERE WAS ANY OBJECTION TO TYPE SIZE OR MARGINS. COUNSEL'S ACTION WAS THUS A REASONABLE AND GOOD FAITH EFFORT TO COMPLY, AND THE HARSH ACTION OF DISMISSAL CANNOT BE LEGITIMATELY JUSTIFIED.

POINT NO. 3

THE INTERESTS OF JUSTICE REQUIRE THAT COUNSEL FOR PETITIONER, WHOSE FIRST NOTICE OF THE COURT'S OBJECTION TO TYPE SIZE AND MARGINS WAS THE MARCH 20, 1991, ORDER OF DISMISSAL BE GIVEN AN OPPORTUNITY TO REFILE. JUSTICE IS NOT SERVED BY DEPRIVING COUNSEL'S CLIENT OF REVIEW ON THE MERITS BECAUSE OF A LEGITIMATE MISUNDERSTANDING OVER TYPE SIZE AND MARGINS. DUE PROCESS REQUIRES MORE.

STATEMENT, ARGUMENT, AND AUTHORITIES UNDER POINT NOS. 1-3

Counsel for Petitioner has never intended to show the slightest disrespect or stubbornness in complying with

this Court's instructions or specifications for applications for writs of error. We respectfully submit that when the full facts are objectively reviewed, the only fair conclusion is that counsel acted in good faith. Neither the rules of this Court nor standards of equity and justice call for depriving Petitioner of a review on the merits because of a misunderstanding over type size and margins. The facts are as follows.[1]

When this Court overruled Petitioner's motion to permit a brief in excess of 50 pages, counsel for Petitioner prepared and submitted a "Redrawn Application for Writ of Error" (referred to herein as "the First Redrawn Application"). In preparing the First Redrawn Application, counsel for Petitioner deleted substantial portions of the original Application for Writ of Error. Specifically, in preparing the First Redrawn Application, counsel for Petitioner deleted text from 74 of the pages in the original Application for Writ of Error, 9 pages of which were deleted in their entirety, which reduced the text of the application by approximately one-third. Counsel for Petitioner did use a smaller print size and narrowed the margins in light of the relatively large margins utilized in the original application. The print size used was virtually the same as that used by Appellee/ Respondent in its briefs and motions filed in this Court and the Court of Appeals.

Counsel for Petitioner simply was unaware of any problem with use of the type size and margins utilized in the First Redrawn Application. Neither Rule 131 nor any other rule contained in the Texas Rules of Appellate Procedure addresses allowable print size and margins. This Court decided not to adopt a rule governing print size and margains at the time Rule 131 was amended to include a 50 page limit on length of applica-

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[1] The facts described herein are set out in the Affidavit of Guy S. Lipe attached hereto as Exhibit "A".

tions. Nor do the rules provide that all briefs filed in a case must be of uniform type size and margins.

The First Redrawn Application did not exceed 50 pages as determined under Rule 131(i). Although the signature block and certificate of service in the First Redrawn Application appear on page 52, all of pages 7 and 8, a portion of page 6, and most of page 9 of the First Redrawn Application contain points of error. Rule 131(i), Texas Rules of Appellate Procedure, provides that pages containing points of error are not to be counted in determining whether the application complies with the 50 page requirement. Tex. R. App P. 131(i). Because approximately 3 pages of the 52 pages in the First Redrawn Application contained points of error, and because counsel for Petitioner was unaware of any problem with the print size and margins utilized, counsel for Petitioner believed in good faith that the First Redrawn Application fully complied with Rule 131(i).

On February 12, 1991, counsel for Petitioner received a telephone call from Peggy Littlefield, Chief Deputy Clerk of this Court, who informed counsel for Petitioner that this Court had instructed that the First Redrawn Application be redrawn pursuant to Rule 131(j). Counsel for Petitioner asked Ms. Littlefield what the problem was with the First Redrawn Application. Ms. Littlefield noted that the signature block on the application was on page 52. When counsel for Petitioner explained his understanding of Rule 131(i), i.e., that pages containing points of error are not to be included in determining whether an application complies with Rule 131(i), Ms. Littlefield stated that she could only tell counsel for Petitioner that the Court had determined that the application was too long and had ordered it to be redrawn. There was no indication that the Court had any problem with the print size or margins—only length was mentioned.

By letter dated February 12, 1991, Ms. Littlefield confirmed the telephonic notification. The February 12, 1991 letter,[2] in its entirety, reads as follows:

> Today, the Supreme Court of Texas has instructed that the redrawn application for writ of error on behalf of White Budd Van Ness Partnership be redrawn pursuant to Rule 131(j), Texas Rules of Appellate Procedure. The redrawn application is due to be filed with the office of the Clerk on or before Tuesday, February 19, 1991.

In response to these telephonic and written notices, counsel for Petitioner prepared the Second Redrawn Application for Writ of Error. To comply with this Court's instructions, counsel for Petitioner reduced the application some 6½ pages from 52 pages (including pages containing points of error) to 45½ pages (including pages containing points of error). Counsel for Petitioner made no changes in the print size and margins in preparing the Second Redrawn Application.[3] It was not until counsel for Petitioner learned of this Court's Order dated March 20, 1991 dismissing Petitioner's application that counsel for Petitioner for the first time was informed that this Court considered the print size and margins utilized in the First and Second Redrawn Applications to be unacceptable.

Neither the telephone notification from Ms. Littlefield that the Court was requiring that the First Redrawn

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[2] A copy of the February 12, 1991 letter is attached to the Affidavit of Guy S. Lipe, which is Exhibit "A" hereto.

[3] An unknown quirk in the word processing equipment resulted in a minute difference in the spacing of letters and lines in the Second Redrawn Application. These minute differences, which were first discovered by counsel for Petitioner during preparation of this Motion For Rehearing, had no effect on the length of the application. This fact is illustrated by a comparison of pages 6 through 17 of the Second Redrawn Application with pages 10 through 21 of the First Redrawn Application. The text of each of the pages in these sections is identical.

Application be redrawn, nor the February 12, 1991 letter from Ms. Littlefield confirming that notification, provided counsel for Petitioner with any notice that the print size or margins in the First Redrawn Application were not acceptable.

Based on the notifications received, counsel for Petitioner believed in utmost good faith that the Court was instructing counsel for Petitioner to further shorten the application, and nothing more, which counsel for Petitioner did by deleting several pages of text. If counsel for Petitioner had known that the Court considered the print size and margins utilized in the First Redrawn Application to be unacceptable, counsel for Petitioner would have used larger print size and margins in preparing the Second Redrawn Application.

The Fifth Circuit Court of Appeals does have a rule governing the print size and margins used in briefs. 5th Cir. R. 32. By way of comparison, if counsel for Petitioner had used the Fifth Circuit's requirements for print size and margins, the Second Redrawn Application, without further revision, would have complied with the 50 page limit (excluding pages containing points of error, as provided by Rule 131(i)). Attached hereto as Exhibit "B" is the Second Redrawn Application with print size and margins revised in accordance with the Fifth Circuit rules.

Now that counsel for Petitioner is aware of this Court's requirements on the print size and margins, counsel for Petitioner has prepared a proposed Third Redrawn Application for Writ of Error, with larger print size and margins, a copy of which is attached hereto as Exhibit "C". The proposed application is 46½ pages long, including pages containing points of error, or 44 pages, excluding pages containing points of error.

Petitioner respectfully submits that counsel for Petitioner in good faith has attempted to comply with the Rules of Appellate Procedure and this Court's directives.

Counsel for Petitioner (1) was not aware of any problem with use of the print size and margins utilized in the First and Second Redrawn Applications, (2) believed in good faith that the First Redrawn Application complied with the 50 page limit in light of Rule 131(i)'s directive that pages containing points of error are not to be counted, (3) made inquiry in an attempt to determine the specific problem with the First Redrawn Application, and (4) attempted to address what was believed to be the Court's concern (length) by further reducing the length of the application by deletion of points of error, combination of points of error, and other textual reductions.

The rules are to be liberally construed to do justice. *Williams v. Khalaf*, 802 S.W.2d 651 (Tex. 1990); Tex. R. App. P. 74(p); Tex. R. Civ. P. 1. Justice and fairness are not served by denying Petitioner a review on the merits because of counsel's good faith misunderstanding over the Court's desires as to type size and margins.

PRAYER

Petitioner respectfully prays that this Court's Order of March 20, 1991 dismissing Petitioner's application be vacated and that Petitioner be granted leave to file its Third Redrawn Application for Writ of Error.

Respectfully submitted,

VINSON & ELKINS

/s/ Harry M. Reasoner
HARRY M. REASONER
TBA # 16642000

/s/ Guy S. Lipe
GUY S. LIPE
TBA # 12394600
EWING WERLEIN, JR.
TBA # 21185000
J. CLARK MARTIN
TBA # 13090000
3200 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2358
Attorneys for Petitioner,
The White Budd Van Ness
Partnership

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion for Rehearing has been duly served upon Mr. Jon Burmeister, Moore, Landrey, Garth & Jones, 285 Liberty, Suite 1900, Beaumont, Texas 77701, by Federal Express, on this the 4th day of April, 1991.

/s/ Guy S. Lipe
GUY S. LIPE

APPENDIX F

IN THE SUPREME COURT OF TEXAS

No. D-502

WHITE BUDD VAN NESS PARTNERSHIP,
Petitioner

vs.

MAJOR-GLADYS DRIVE JOINT VENTURE,
Respondent

AFFIDAVIT OF GUY S. LIPE

THE STATE OF TEXAS)

COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared GUY S. LIPE, who being duly sworn upon his oath to tell the truth did state the following:

I.

My name is Guy S. Lipe. I am over the age of twenty-one (21) years and am fully competent to make this Affidavit. I have personal knowledge of the facts stated herein and they are all true and correct.

II.

I am one of the attorneys for Petitioner The White Budd Van Ness Partnership in the above-captioned cause.

III.

When the Supreme Court of Texas overruled Petitioner's motion to permit a brief in excess of 50 pages

in the above-captioned case, I prepared a "Redrawn Application for Writ of Error" (referred to herein as "the First Redrawn Application"). In preparing the First Redrawn Application, I deleted substantial portions of the original application for writ of error. Specifically, in preparing the First Redrawn Application, I deleted text from 74 of the pages in the original Application for Writ of Error, 9 pages of which were deleted in their entirety, reducing the text of the application by more than one-third. I did use a smaller print size and narrowed the margins in light of the relatively large margins utilized in the original application. The print size used was virtually the same as that used by Appellee/Respondent in other briefs and motions filed in this case in the Court of Appeals and the Supreme Court. I was not aware of any prohibition against use of the print size and margins utilized in the First Redrawn Application, and I believed them to be reasonable.

IV.

The signature block and certificate of service in the First Redrawn Application appear on page 52. However, all of pages 7 and 8, a portion of page 6, and most of page 9 of the First Redrawn Application contain Points of Error. In preparing the First Redrawn Application, I relied on Rule 131(i), Texas Rules of Appellate Procedure, which provides that pages containing points of error are not to be counted in determining whether the application complies with the 50 page requirement. Because approximately three full pages of the 52 pages in the First Redrawn Application contained points of error, I believed in good faith that the First Redrawn Application complied with Rule 131(i), Texas Rules of Appellate Procedure.

V.

On February 12, 1991, I received a telephone call from Peggy Littlefield, Chief Deputy Clerk of the Texas Supreme Court, informing me that the Court had instructed that the First Redrawn Application be redrawn pursuant to Rule 131(j), Texas Rules of Appellate Procedure. I asked Ms. Littlefield what the problem was with the First Redrawn Application. She noted that the signature block on the application was on page 52. When I explained my understanding of Rule 131(i), i.e., that pages containing points of error are not to be included in determining whether an application complies with Rule 131(i), Ms. Littlefield stated that she could only tell me that the Court had determined that the application was too long and had ordered it to be redrawn. There was no indication that the Court had any problem with the print size or margins.

VI.

By letter dated February 12, 1991, Ms. Littlefield confirmed the telephonic notification. A true and correct copy of the February 12, 1991 letter is attached hereto as Exhibit 1.

VII.

Based on the telephonic and written notices from Ms. Littlefield, I believed in good faith that the Court was instructing Petitioner to shorten the application, and nothing more. I did so in the Second Redrawn Application by deleting three points of error (Point of Error Nos. 13, 16, and 19 in the First Redrawn Application) and the arguments in support thereof, combining four points of error (Point of Error Nos. 4, 5, 6, and 8 in the First Redrawn Application) into a single point of error (Point of Error No. 4 in the Second Redrawn Application), and deleting other text

of the First Redrawn Application. I did not change the print size and margins in preparing the Second Redrawn Application.[1] It was not until I learned of the Court's Order dated March 20, 1991 dismissing Petitioner's application that I became aware that the Court considered the print size and margins utilized in the First and Second Redrawn Applications to be inappropriate.

VIII.

If I had known that the Court considered the print size and margins utilized in the First Redrawn Application to be inappropriate, I would have utilized larger print size and margins in the Second Redrawn Application. If I had utilized the Fifth Circuit Court of Appeals' requirements for print size and margins, the Second Redrawn Application, without further revision, would have complied with the 50 page limit (excluding pages containing points of error, as provided by Rule 131(i)). Attached as Exhibit "B" to Petitioner's Motion for Rehearing is a copy of the Second Redrawn Application with print size and margins revised in accordance with Fifth Circuit rules.

IX

In preparing the First Redrawn Application and the Second Redrawn Application, I at all times was attempting to comply with the Rules of Appellate Procedure and the directives of this Court. Now that I am aware of the Court's concerns with the print size and margins utilized in the First and Second Re-

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[1] While preparing the Motion For Rehearing, I noticed for the first time that an unknown quirk in the word processing equipment resulted in minute differences in the spacing of letters and lines in the Second Redrawn Application. These minute differences did not effect [sic] the length of the application. This fact is illustrated by a comparison of pages 6 through 17 of the Second Redrawn Application with pages 10 through 21 of the First Redrawn Application. The text of each of the pages in these sections is identical.

drawn Applications, I have prepared a proposed Third Redrawn Application, a copy of which is attached as Exhibit "C" to Petitioner's Motion for Rehearing, which is 46½ pages long, including pages containing points of error, or 44 pages, excluding pages containing points of error.

/s/ Guy S. Lipe
GUY S. LIPE

SUBSCRIBED AND SWORN TO BEFORE ME on this the 3rd day of April, 1991, to certify which witness my hand and official seal.

/s/ DARLENE JELLY
Notary Public, State of Texas

APPENDIX G

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 12, 1991

Mr. Guy S. Lipe
Vinson & Elkins
3205 First City Tower
1001 Fannin
Houston, TX 77002-6760

Mr. Jon B. Burmeister
Moore, Landrey, Garth & Jones
Liberty-Pearl Complex
285 Liberty, Suite 1900
Beaumont, TX 77701

RE: Case No. D-0502

Style: WHITE BUDD VAN NESS PARTNERSHIP
v. MAJOR-GLADYS DRIVE JOINT VENTURE

Dear Counsel:

Today, the Supreme Court of Texas has instructed that the redrawn application for writ of error on behalf of White Budd Van Ness Partnership be redrawn pursuant to Rule 131(j), Texas Rules of Appellate Procedure. The redrawn application is due to be filed with the office of the Clerk on or before Tuesday, February 19, 1991.

Respectfully yours,

JOHN T. ADAMS,
Clerk

/s/ Peggy Littlefield
PEGGY LITTLEFIELD
Chief Deputy Clerk

APPENDIX H

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 24, 1991

Mr. Guy S. Lipe
Vinson & Elkins
3205 First City Tower
1001 Fannin
Houston, TX 77002-6760

Mr. Jon B. Burmeister
Moore, Landrey, Garth & Jones
Liberty-Pearl Complex
285 Liberty, Suite 1900
Beaumont, TX 77701

RE: Case No. D-0502

Style: WHITE BUDD VAN NESS PARTNERSHIP
v. MAJOR-GLADYS DRIVE JOINT VENTURE

Dear Counsel:

Motions for extension of length of briefs in the above styled case were this day overruled. The Court has instructed that the application for writ of error on behalf of White Budd Van Ness Partnership be redrawn pursuant to Texas Rule of Appellate Procedure 131(i)(j). The redrawn application is due to be filed with the Clerk of this Court on or before Monday, February 4, 1991.

The reply on behalf of Major-Gladys Drive Joint Venture should also be redrafted pursuant to Rule 131(j), Tex. R. App. P., and is due to be filed with the Clerk of this Court on or before Thursday, February 14, 1991.

Sincerely,

JOHN T. ADAMS,
Clerk

by /s/ Peggy Littlefield
PEGGY LITTLEFIELD,
Chief Deputy Clerk